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“My President Is Black And I Be Goddamned If My Agent Ain’t Too!”

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INTRODUCTION

“These are the lyrics that blasted from the stereos of many young black urbanites after Barack Obama became the first black president of the United States of America. Within the black community, President Obama’s victory inspired the reality of his pre-inauguration celebration speech wherein he proclaimed that “anything is possible.” Because the black community has traditionally been disenfranchised and excluded from equal participation in pursuing the American dream, President Obama’s historic victory inspired a reality that many black people thought would never happen, the election of the United States’ first black president.

Young Jeezy’s song “My President” captured the essence of President Obama’s victory to the black community - “My president is black, my lambo is blue and I be god damned if my rims ain’t too.” With these lyrics, Young Jeezy was highlighting the importance of black trailblazers - those individuals that have left a path of success for other blacks to follow. As Jeezy notes, he was an inspiration to his community because he was the first person to drive through “da hood” in a blue Lamborghini. Through this act, he inspired the possibility of success and dispelled the myth that people from his community could not make it. Similarly, President Obama’s victory inspired the consciousness of Black America and more specifically has had a palatable effect on

1 Insert Footnote
2 YOUNG JEEZY, MY PRESIDENT, (Def Jam Records 2008).
black males. As Professor Fiero accurately explained prior to president Obama’s victory, if Barak Obama is elected president, black men will stop blaming the man, and start being the Man.

“Every door will be open. Every American dream - including being president - can be a reality. Our view and definition of The Man will finally be flipped; replaced by a positive self-image and greater awareness of the super powers we possess, but seldom activate. We will become more motivated to utilize resources, get better jobs, start successful businesses, and capitalize on opportunities because the leadership and role model that so many of us have lacked, will have emerged in the highest visible position in the country - the presidency. In short, The Barack Obama effect will mean that our statute of limitations on excuses will have officially run out. The fixed mindset that has plagued black men for centuries from the aforementioned internalization of negative perceptions will be repaired. The Effect of Barack Obama will germinate a growth mindset which will benefit black men for centuries to come.”

In the same manner that President Obama has inspired black Americans, and in the same manner that Jeezy has inspired “da hood,” black coaches have the capacity to inspire black athletes. Presently, black athletes overwhelmingly select white agents as their agent representatives. In spite of this fact, the Rooney Rule, which requires that all NFL franchises interview at least one minority candidate before making a final hiring decision, gives new hope to black agents in the NFL. Through the Rooney Rule, black players will observe more blacks in positions of power and they will finally begin to see a power structure where blacks occupy key decision making positions. As this occurs, the myth that blacks are unsuitable for such positions will be dispelled because black athletes will begin to see a reality where blacks hold significant leadership roles and positions of power. Thus, if black players can now readily observe a black president and a black head coach, then the reality of a black agent is much more feasible.

5 Gian Fiero, The Barack Obama Effect on Black Men, Nov. 12, 2008, http://www.articlesbase.com/goal-setting-articles/the-barack-obama-effect-on-black-men-639774.html#ixzz0oWBy9rQt; See also http://www.cnn.com/2009/LIVING/11/04/obama.effect/index.html (On the first anniversary of President Barack Obama’s election, the glow of his ascendancy may be fading for some but hope is still burning bright for a growing number of African-American men who have been inspired by Obama to step up their game. Organizations from black fraternities to Big Brothers Big Sisters of America say they’re seeing a change of conduct among black men.)
Thus far, the majority of the scholarship involving the Rooney Rule has focused on its impact on the increase in the number of minority coaching hires; the potential impact that a similar rule could have on other professional leagues; the application, feasibility, and possibility of a Rooney Rule type rule at the collegiate level; the Rooney Rule and its application to administration; and the Rooney Rule and its characterization as an affirmative action policy.

Yet, there is another area where the Rooney Rule may have a palpable effect – its potential impact on black athletes in increasing the likelihood that they will appreciate the advantages of hiring black agents. This article will advance an argument explaining how the Rooney Rule will lead to an increase in the number of black athletes that hire black agents. Part I will briefly discuss the role of the black athlete in black American culture. Part II explains the Rooney Rule, highlights its application and briefly discusses the historical foundation and context out of which

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9 Jarrett Bell, Group seeks diversity in NFL front offices, USA TODAY, Mar. 7, 2005, http://www.usatoday.com/sports/football/nfl/2005-03-07-rooney-rule-expansion_x.htm (discussing the desire to apply the Rooney Rule to front office positions as well as coaching positions). See also Jarrett Bell, Parcells floats Rooney Rule, Jan. 8, 2008, http://daily.phanaticmag.com/2008/01/parcells-flouts-rooney-rule.html (implying that NFL teams have found a way to bypass the purpose of the Rooney Rule by ceremoniously interviewing minority coaching candidates before hiring a non-minority candidate that the team already had in mind).
the Rooney Rule developed. Part III discusses the perceived reasons why black agents have difficulty securing representation of black athletes. Part IV explains how the Rooney Rule will help to “legitimize” the black agent in the eyes of the black athlete. Part V provides an alternative to the current system for selecting agents that will substantially increase black agents’ ability to compete with white agents for clients. Finally, Part VI highlights other considerations that will help to increase the number of black players who hire black agents.

Part I: The Black Athlete & Black Culture

The role of the black athlete in professional football has significantly expanded in the past fifty years. In 1920, Fritz Pollard\(^1\) and Bobby Marshall\(^2\) became the first black players in what is now known as the National Football League (“NFL”).\(^3\) By 1934 there were no black players in the NFL, and it was not until after World War II that another black player would play in the league.\(^4\) Today, however, black players account for approximately sixty-five percent of

\(^1\) See generally Fritz Pollard, Biography, http://www.profootballhof.com/hof/member.jsp?player_id=242, (last visited April 1, 2010) for a discussion on Fritz Pollard’s instrumental role as one of only two African Americans in the 1920 inaugural season of what is now known as the National Football League. He also led his team to an undefeated season to win the league’s first crown and became the first African American head coach in NFL history in 1921.

\(^2\) See generally Bobby Marshall, Biography, http://www.collegefootball.org/famersearch.php?id=29, (last visited May 19, 2010) for a discussion on Bobby Marshall’s instrumental role as one of only two African American in the National Football League where he played from 1920 to 1924, along with his other achievements in college football.

\(^3\) See generally History of Football, NFL founded in Canton, Ohio, http://www.profootballhof.com/history/decades/1920s/founded.jsp (last visited May 19, 20010) (discussing the renaming of the American Professional Football Association to its current name the National Football League in 1922).

\(^4\) John C. Walter, The Changing Status of the black Athlete in the 20th Century United States, AMERICAN STUDIES TODAY ONLINE, 1996, http://www.americansc.org.uk/Online/walters.htm#References. (“After World War II, the attitude of Black people changed dramatically. The war had improved the lot of the uplift organizations, the National Urban League, the National Association for the Advancement of Colored People, as well as the Congress of Racial Equality, which had conducted bus rides throughout the South in the war years in an attempt to regain those rights that had been taken away from African Americans after the end of Reconstruction. In addition, African Americans had gained entry into the American Federation of Labor and other labor unions, and these organizations exerted additional political pressure on public institutions and on the larger population to treat Black people as equal citizens.”).
the athletes in the NFL. While playing in the NFL has substantially increased the economic prospects of many blacks, this has not always been the case. “In the 60s and 70s, it could be argued that the black athlete was financially, and otherwise, undervalued to a point that made arbitration and serious salary negotiations impossible.” However, during the 1980s and 1990s, the situation changed dramatically and now black athletes are among the highest paid players in the NFL.

Interestingly, while the economic value of the black athlete and his role in the NFL has increased, the role of the black sports agent has increased to the same extent. Few black players hire black agents. Instead, most black athletes hire white agents. This disparity is extremely troubling given the fact that black agents may be able to provide black athletes with better mentorship, a stronger client/agent connection, and in some instances a more common life

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16 Bnet.com, Six black athletes in top 10 best paid – list of highest paid professional athletes, JET, Dec. 20, 1993, at 4, available at http://findarticles.com/p/articles/mi_m1355/is_n8_v85/ai_14866159 (demonstrating that the economic opportunities of black athletes, in general, have substantially increased by highlighting that 6 of the 10 highest paid professional athletes are black).

17 Walter, supra note 14.

18 Larry Weisman, NFL Salaries ‘08: Big Ben Smiling as Highest Paid Player, USA TODAY, Nov. 5, 2008, http://www.usatoday.com/sports/football/nfl/2008-11-05-salaries_N.htm#table (In 2008, of the twenty (20) highest paid players in the NFL, fifteen (15) or seventy-five percent were black).

19 Joseph E. Green-Bishop, Black Sports Agents Want to See the Money, Too., Balt. Bus. J., Oct 17, 1997, available at http://www.bizjournals.com/baltimore/stories/1997/10/20/newscolumn6.html (While black players hire white agents at disproportionately high levels, few white players hire black agents - "I don’t understand it," says a Baltimore sports agent. "I don’t know of a single white player who has a black agent. But you can’t even get to some of the black players if you are a black professional. They and their money are controlled by other people."). See also George J. Tanber, African-American Sports Agents Address Challenges in the Business, Feb. 28, 2008, http://sports.espn.go.com/espn/blackhistory2008/news/story?id=3268714 (“[C.] Lamont Smith, an agent, recalls the first day of last year’s NFL draft, when 14 out of the first 15 players selected were African-Americans, but only one -- Gaines Adams of Clemson -- selected an African-American agent, Fletcher Smith. (The only white player in the first 15, Joe Thomas of Wisconsin, chose Smith’s company, All Pro Sports and Entertainment. Smith’s partner and fellow agent, Peter Schafer, is white and is listed as Thomas’ agent.").


experience. If more black athletes select black agents, black athletes will have a more viable economic situation as well as a stronger sense of self and community awareness. Black agents are more likely to expose black athletes to other black professionals including black realtors, black accountants, black investment bankers, and black lawyers. As a result, when black athletes hire black agents, there is an increased likelihood that the fruits of the black athlete’s labor will remain in the black community. These issues are extremely important given the role that black athletes play in the black community.

Most black folks in America don't just see great athletes. Our situation is much deeper. Our athletes have most often served a deeper purpose than their sports heroics. We see in them sources of salvation. At times, they make us look at sports as more than fun and games. We look at those who play them as more than athletes whose feats are on YouTube for our kids to watch. To trace our history, black/African-American history, is to discover and then realize that the role of sports has never been only recreation, only something we do for exercise or entertainment. For us, sports has been a component of freedom. It's been the voice we've found through our arms and legs when our mouths have been silenced.

The modern role of a sports agent extends beyond the negotiation of contracts. Often times, the agent is called upon to be an investment banker, a teacher, a friend, a parent and more

22 Tanber, supra note 19. (quoting Sharon Creer - African-American agents should have an advantage recruiting African-American athletes, particularly those who come from poor urban areas, because the agent should be able to better relate to the athletes and their families).
23 Green-Bishop, supra note 19. (suggesting that black agents are more likely to suggest to their clients that they invest their money in the African-American community because black agents will be able to facilitate this process much easier than their white counterparts because a black agents will have access to a host of other black professionals).
24 Lynn Norment, Scoring with multimillion dollar contracts - black athletic agents - Blacks in Sports: The Last Frontiers, EBONY, August 1992, http://findarticles.com/p/articles/mi_m1077/is_n10_v47/ai_12511463/?tag=content;coll (last visited June 11, 2010). (The Black athlete has been underserved in the past, says Ransom, explaining that many Black athletes are not being ‘guided’ into giving back to the community. However, he didn't have to do any guiding with his client Marco Coleman of the Miami Dolphins. "I decided I wanted a Black agent because one of the things that can help our people progress is to give our business to our people," says Coleman. "I couldn't have the same relationship with a White man as I have with a Black man).)
25 Green-Bishop, supra note 19. ("Once a black player is signed by a white agent, the black community can forget about getting any of his money . . . We are left out in the cold.").
importantly, a mentor.\textsuperscript{28} Through these roles, an agent has a significant opportunity to influence the athlete and to assist the athlete in making decisions that will positively impact the athlete and the athlete’s community. When black athletes are represented by white agents, it is less likely that the trickle-down effects of the black athlete’s success will reach and impact the black community positively.\textsuperscript{29} While the black community purchases a significant amount of NFL merchandise, game tickets, and other NFL related products, the economic residual rarely makes it back to the black community.\textsuperscript{30} When black athletes are successful in the NFL, the black community loses out financially to white owners,\textsuperscript{31} the major corporations that do business with the NFL, and white agents. For these reasons, race consciousness in the agent selection process should be a viable, positive consideration for the black athlete.\textsuperscript{32} As Professor Kenneth Shropshire notes:

\begin{quote}
[A] more appropriate argument, in support of race-consciousness in the agent selection process, is the closer sociological relationship between two African-Americans. The similar life experiences of two African-American men is a bond that is unique. The potential for an older African-American man to prepare the athlete for the issues he will confront when no longer the revered athlete is difficult for those who have not suffered to understand…. In this arena, the race
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\textsuperscript{28} Shropshire, \textit{supra} note 27, at 194.
\textsuperscript{29} Green-Bishop, \textit{supra} note 19. ("Once a black player is signed by a white agent, the black community can forget about getting any of his money . . . We are left out in the cold.")
\textsuperscript{30} Charles Hallman, Black Sports Agents Face a Double-Whammy, May 4, 2007, http://blackathlete.net/artman2/publish/Community_18/Black_Sports_Agents_Face_A_Double-Whammy.shtml (According to James C. Selmer of Selmer Sports Management in Minneapolis African American players have an “opportunity to redistribute wealth by acquiring African American agents, but what happens is [that] the revenue that comes to African American players comes from the White-owned football teams and gets redistributed back to the White agents, who propagate the notion that African American agents can’t do what [they] can do.")
\textsuperscript{32} Shropshire, \textit{supra} note 21, at 133. ("The father of NFL running back Barry Sanders accurately expressed…. ‘I wasn't going to raise my son his whole life and then turn him over to some white people and let them run his life,’ says William Sanders. ‘A lot of them called me and told me how well they knew all the owners, how they played golf with them, but to me that's the worst thing for a player if the agent and owner are that close. I was looking for somebody honest, somebody I could communicate with and go to church with. I just felt more comfortable with blacks. Some people might say that's prejudice, but it's not. Plus, their kids don't sign with black agents; why should ours sign with white agents?").
factor should be recognized as the positive that it very well may be…. It is enough that athletes grow to not view the race of African-American sports agent candidates as negative but positive. In other words, in the bundle of qualifications to consider in a prospective sports agent, race should be one of them. No one is capable of making these decisions in a color-blind manner. Race has always been a factor, but one where being white was positive and black negative. Using the presumption that because the agent and athlete, both African-Americans, may have some shared experiences, the otherwise equally qualified white agent may not be the person who should be hired for the job.\textsuperscript{33}

In spite of the fact that few black players select black agents, the Rooney Rule gives new hope to black agents in the NFL. Through the Rooney Rule, black players will observe more blacks in positions of power. As this occurs, the myth that blacks are unsuitable for such positions will be dispelled because black athletes will begin to see a reality where blacks hold significant leadership roles and positions of power.

\textbf{Part II: The Rooney Rule}

The Rooney Rule, named after Pittsburgh Steelers’ owner and NFL diversity committee chairman, Dan Rooney,\textsuperscript{34} requires that NFL franchises interview at least one minority head coaching candidate before making a final head coach hiring decision. The lone exception is when a club makes a prior contractual commitment to promote a member of its own staff.\textsuperscript{35}

On Monday, June 15, 2009, the NFL announced that it had extended the application of the Rooney Rule from head coaching vacancies to also include openings for general manager jobs and other

\textsuperscript{33} Shropshire, supra note 21, at 137-138.

\textsuperscript{34} Alan Robinson, Dan Rooney’s Title Now Steelers’ Chairman Emeritus, N.Y. TIMES.COM, July 31, 2009, http://abcnews.go.com/Sports/wireStory?id=8226599 (“[Dan ] Rooney, whose family has owned the Steelers since their founding in 1933, was the Steelers’ president from 1975 until 2003, when he became team chairman… Dan Rooney has long been involved in NFL labor relations, was largely responsible for ending two labor-related shutdowns, and helped craft the NFL’s TV policy. He also pushed for the league to adopt what has become known as the Rooney Rule, which requires teams to interview minorities for coaching jobs and, now, other key positions… [Dan] Rooney was elected to the Pro Football Hall of Fame in 2000.”).

\textsuperscript{35} John Oehser, Ready When Needed, June 2, 2008, http://www.colts.com/sub.cfm?page=article7&news_id=ac67e903-3578-4dd9-8342-69f58e118c68 (the Indianapolis Colts’ associate head coach’s, Jim Caldwell, has a comparable clause in his contract when Tony Dungy decides to step down. Although NFL teams can attempt to side step the Rooney Rule and its application by merely including pre-hire contractual agreements, this issue is not implicated by Jim Caldwell’s agreement since he is black. Although the Rooney Rule did not come into existence until 2003, this type of exception was also implicated when the St. Louis Rams hired offensive coordinator Mike Martz in 2000 as its head coach.).
equivalent front-office positions. Pursuant to this new rule, NFL franchises must interview at least one minority candidate before making a final hiring decision. This rule will not apply “to a case in which a team's top front-office job is held or filled by the franchise's owner or a member of his or her family, or in a case in which a team has an existing contractual obligation to promote a member of its front-office staff.” Prior to this recent development, the NFL’s diversity committee had issued a set of hiring guidelines that recommended that teams “voluntarily” interview minority candidates for open executive positions; however, unlike the Rooney Rule, failure to comply with the rule did not result in any sanctions. Thus, the previous executive interview guidelines were more akin to a “paper tiger” in that there was no force of penalty.

A. The Pre-Rooney Rule Historical Context

The idiom of “the carrot or the stick” usually refers to the offering of a reward “the carrot” or punishment “the stick” as motivation for a desired result. This idiom is illustrative of the approach used by Johnnie Cochran and Cyrus Mehri to force the NFL to adopt the Rooney Rule (although a better characterization might be that of a double stick because of the litigation threat posed by both Mr. Cochran and Mr. Mehri.). One can only imagine the fear as well as the respect that Commissioner Paul Tagliabue must have felt during his interactions with these

37 Id.
38 Id.
41 Paul Brians, Wash. State Univ., Dep’t of English, “Carrot on a Stick” vs. “The Carrot or The Stick” (1998), http://www.wsu.edu/~brians/errors/carrot.html (discussing the roots of the idioms “the carrot or the stick” and “the carrot on a stick,” both reflect the carrot as an enticement or expected reward, however “the carrot or the stick” presents the contrast of the carrot as an enticement and the stick as a punishment).
42 andre’ d. cummings, Pushing Weight, 33 T. MARSHALL L. REV. 95, 100-02 (2007) (“Imagine what it must have been like for Paul Tagliabue to have Johnnie Cochran and Cyrus Mehri sitting across from him threatening the use of litigation to enforce equality.”).
two individuals. Mr. Tagliabue clearly recognized the importance of increasing diversity among NFL coaches, but more importantly he also recognized that the NFL faced a viable and credible threat of litigation from two of the most feared litigators in the entire history of the United States legal system. Although the feasibility of pursuing a Title VII discrimination claim against the NFL would likely have presented difficult evidentiary hurdles, the NFL, at a minimum, faced the prospect of costly litigation and a legitimate media nightmare. It was this context that sparked the NFL to implement the Rooney Rule.

Because of the dismal number of black coaches in the NFL, in the fall of 2002, Mr. Cochran and Mr. Mehri commissioned Dr. Janice Madden of the University of Pennsylvania to analyze the statistical disparities among minority coaches in the league. The Report confirmed

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44 Loyola Law School.edu, Johnnie Cochran Alumni Profile, http://alumni.lls.edu/profiles/Cochran.html (“The attorney and civil rights leader rocked the legal world with landmark victories in police misconduct cases and with such high-profile clients as O.J. Simpson, Michael Jackson, Reginald Denny and Geronimo Pratt.”). See also Cyrus Mehri, Biography, http://www.fpal.org/mehri.php (“Mr. Mehri served as Class Counsel in the two largest race discrimination class actions in history. Roberts v. Texaco Inc. settled in 1997 for $176 million. Ingram v. Coca-Cola Enter. Inc., settled in 2001 for $192.5 million. Both settlements include historic programmatic relief, featuring independent Task Forces with sweeping powers to reform key human resources practices such as pay, promotions, and evaluations.”).
45 Neil Forester, The Elephant in the Locker Room: Does the National Football League Discriminate in the Hiring of Head Coaches?, 34 MCGEORGE L. REV. 877, 894-96 (2003) (explaining that in the absence of a “smoking gun” document, the disparate treatment analysis is insufficient to prove actual intent on the part of franchise owners; therefore, if a case were to be brought on a disparate treatment theory, the result would depend in large part upon the plaintiff’s attorney convincing the trier of fact to infer intent from the plaintiff’s facts of the case. However, more than mere statistics will be required to show disparate impact. Neither Professor Madden’s report nor Cochran and Mehri’s analysis indicates that any particular employment practices on the part of the franchises are responsible for the statistics showing the wide disparity in the races of NFL head coaches. Without establishing a specific employment practice, it does not appear that an allegedly injured black head coach candidate could prove successful under a disparate impact theory. Moreover, if a candidate could prove a specific discriminatory employment practice the franchise could then respond by claiming that the practice has a legitimate business justification. However, the franchise's success in this argument will largely depend on the practice under attack and the proof offered to sustain it), noted in Super Bowl XLI: Power Concedes Nothing Without A Demand- Frederick Douglas, http://cstoneblog.com/2009/01/17/super-bowl-xli-%e2%80%9cpower-concedes-nothing-without-a-demand%e2%80%9d-frederick-douglas/ (Jan. 17, 2009, 4:20 EST) (“With the data to prove discrimination, the NFL was facing a damaging lawsuit, which in football jargon was fourth and long. The NFL rightly decided to punt.”).
46 Collins, supra note 10, at 886.
47 Cochran & Mehri, supra note 43, at 1-4. (explaining that Dr. Madden’s report analyzed data from the NFL from 1986 to 2001).
Mr. Cochran’s and Mr. Mehri’s presumption that the process by which head coaches were selected in the NFL discriminately impacted black head coaching candidates. In fact, Dr. Madden’s report revealed that while seventy (70) percent of all NFL players were black, only six percent of the head coaches were black. The report also concluded that black coaches were more successful than their white counterparts. In fact, black coaches averaged 1.1 more wins per season than white coaches and led their teams to the playoffs sixty-seven (67) percent of the time as compared to thirty-nine (39) percent of the time for white coaches.

**B. The Legitimate Threat of Litigation**

Armed with Dr. Madden’s report, Mr. Cochran and Mr. Mehri made it clear that they would pursue a class action lawsuit against the NFL unless “substantial progress was made by the NFL in the hiring of blacks for head coaching positions.” Confronted with the impending threat of litigation, the NFL quickly formed the NFL workplace diversity committee. As a part of the report, Mr. Cochran and Mr. Mehri sought to address the lack of opportunity for

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48 Cochran & Mehri, *supra* note 43, at 1-4. (indicating that while only six percent of the coaches were black, 28 percent of the assistant coaches and coordinators were black. Conversely, whites, who only account for 30 percent of the players, comprised 72 percent of the assistant coaches and coordinators and 94 percent of the head coaches. Moreover, the report demonstrated that black coaches tended to have more success in their first year of coaching than whites-black coaches averaged 9.1 wins while white coaches averaged 8. With respect to play off performance during the first year of coaching, black coaches led their team to the playoffs 66 percent of the time compared to 39 percent of time for white coaches).

49 Cochran & Mehri, *supra* note 43, at 1-4. (admitting in her report, in light of these startling statistics, Dr. Madden states that there were too few black coaches to apply formal statistical analysis. If Mr. Cochran and Mr. Mehri decided to bring suit, this statistical problem may have been problematic in trying to establish a claim of disparate impact under Title VII).


51 Paul Zimmerman, *Pride or Prejudice?: Minority hiring in the NFL isn’t a clear-cut topic*, Mar. 27, 2003, http://www.thesportjournal.org/article/inherent-conflicts-interest-national-football-league-management-structure-may-render-rooney- (“So now the league is addressing it, and the biggest plus for having a Johnnie Cochran around is that maybe the fear of litigation is causing the league to at least do something.”).

52 Bell, *supra* note 9.
minority coaches through their “Proposed Fair Competition Resolution.”\(^{54}\) This resolution sought to promote equality in opportunity by setting forth specific rewards and punishments for compliance with the Rooney Rule.\(^{55}\) As a part of the original resolution, the NFL Commissioner was empowered to reward teams with a draft pick for engaging in noteworthy hiring practices; however, if a team chose to opt out of the Rooney Rule in selecting a head coach they would forfeit a first round draft pick.\(^{56}\) If a team wanted to opt out of interviewing a minority assistant coach or coordinator they could choose to forfeit a third round pick.\(^{57}\) The NFL ultimately decided not to adopt the fair competition resolution and instead allowed the NFL to levy a financial penalty against any team that did not comply with the Rooney Rule.\(^{58}\)

After the Rooney Rule’s adoption, it was met with both internal and external criticism. As Professor Duru explains in his article entitled, *The Fritz Pollard Alliance, the Rooney Rule, and the Quest to “Level the Playing Field” in the National Football League*,

"From the start, the Rooney Rule was met with significant skepticism. Indeed, criticism rained down from all quarters. NFL insiders questioned the League’s decision to take its lead in pursuing diversity from two lawyers previously unaffiliated with the League and its internal mechanisms. If anyone should guide the League on these issues, they argued, he or she should be from the football community— from a group of NFL alums or from the League’s, or one of its teams’, front offices. Others, recognizing the Rule contained no accompanying penalty mechanism, wondered whether teams would bother to heed the Rule, and if they didn’t, whether the League would do anything about their failures to do so. Still others argued that even assuming teams followed the Rule, because the interviewing team had no obligation to hire a minority coach,

\(^{54}\) Forester, *supra* note 45, at 882 (analyzing whether a viable action could have been brought under a disparate treatment or disparate impact theory under Title VII).

\(^{55}\) Forester, *supra* note 45, at 882.

\(^{56}\) Forester, *supra* note 45, at 882.

\(^{57}\) Forester, *supra* note 45, at 882.

the interview would prove merely ornamental. Burdened with these criticisms, the Rooney Rule’s early life was shaky.\textsuperscript{59}

C. The Success of the Rooney Rule

Prior to the adoption of the Rooney Rule in December of 2002, there were only two minority head coaches in the NFL.\textsuperscript{60} Since the adoption of the Rooney Rule, however, there have been eleven minority head coaches, one of whom, Mike Tomlin, is the current head coach of the 2009 Superbowl Champion, Pittsburgh Steelers. Coach Tomlin’s selection as the head coach of the Pittsburgh Steelers in January of 2007 highlights the essence of the Rooney Rule. When Bill Cowher stepped down as the head coach of the Pittsburgh Steelers, there was a strong contingency that believed the Steelers would ultimately hire Russ Grimm\textsuperscript{61} or Ken Whisenhunt.\textsuperscript{62} However, the spirit of the Rooney Rule was in full effect as the Steelers ultimately chose Mike Tomlin as their new head coach. Coach Tomlin’s name managed to make it onto the Steelers’s list of qualified minority coaching candidates after he completed a successful stint as the defensive coordinator for the Minnesota Vikings. But for the Rooney Rule, it is highly unlikely that Coach Tomlin would have been considered for the position. In fact, Art Rooney II, the President of the Pittsburgh Steelers, specifically stated that Coach Tomlin was a “long shot” for the position when they began the search for possible replacements.\textsuperscript{63}


\textsuperscript{60} Id.


\textsuperscript{62} NFL.com, Arizona Cardinals, Head Coach: Ken Whisenhunt, http://www.nfl.com/teams/arizonacardinals/coaches?coaType=head&team=ARI (Ken Whisenhunt was the line coach for the Pittsburgh Steelers under Bill Cowher and is not the head coach of the Arizona Cardinals).

The Rooney Rule provided Coach Tomlin with a chance to prove his capacity for the position and with this chance, he was able to prove that he possessed the motivation, enthusiasm and organizational skills to successfully coach the Steelers through the NFL playoffs and a Super Bowl victory over the Phoenix Cardinals, by a score of 27 to 23, during Super Bowl XLIII on February 1, 2009 in Tampa, Florida. With this victory, Coach Tomlin became the youngest and only the second black head coach to win the Super Bowl since Tony Dungy first did it in 2007 with the Indianapolis Colts. Even more historic was the fact that when Coach Tomlin and the Pittsburgh Steelers traveled to the White House to meet President Obama, it was the first time that a black NFL head coach met a black president. These successes clearly reflect the importance of the Rooney Rule. As Mr. Mehri stated during a 2007 interview in the Pittsburgh Tribune-Review, “if not for the Rooney Rule, there would not be as many [minority] head coaches as there are today.” Dr. Richard Lapchick, who heads the sports business management program at Central Florida and champions racial equality in sports, agreed with Mr. Mehri’s sentiment and opined that “the Rooney Rule has been one of the most important rules in professional sports in terms of racial hiring practices,” and its impact has gone far beyond the head coaching position. In fact, because of the success of the Rooney Rule in the NFL, there is now a substantial push for the NCAA to adopt a similar policy to increase the number of minority head football coaches at the collegiate level.

64 NFL.com, Superbowl XLII, http://www.nfl.com/superbowl/43.
66 Super Bowl XLII, supra note 65.
68 Id.
D. Post Rooney Rule Developments

Shortly after the NFL adopted the Rooney Rule, the Fritz Pollard Alliance (“FPA”) was formed as an affinity group of NFL minority coaches, scouts and front-office personnel. The Fritz Pollard Alliance has worked with the NFL to develop hiring guidelines for front-office and scouting positions as well as talent development programs. It continues to work closely with the NFL to create opportunities for minority candidates by recommending candidates for vacancies and running mentoring programs facilitated by older black coaches and executives. Moreover, the FPA “educates NFL team owners and managers regarding the availability of minority candidates for team staff positions and advocates the hiring and promotion of minority candidates in NFL team staff hierarchy through public education and communication with team and league ownership and management.” Finally, the FPA continually advocates for policy changes in the NFL hiring practices.


Several reasons have been identified as to why black athletes are reluctant to select black agents, including (A) the historical allegiance of black athletes to white agents, (B) the lack of competent black agents, (C) the negative rhetoric of white agents, (D) the seductive resources white agents possess to court black athletes, (E) the media’s disparaging portrayal of the

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72 Duru supra note 59, at 189-190.


75 Sammataro, supra note 74, at 539. See also Phillip M. Hoose, Necessities: Racial Barriers in American Sports, quoted in THE BUSINESS OF SPORTS AGENTS, 275, 275 (Kenneth Shropshire & Timothy Davis).

76 Williams Today Would Hire a Minority, USA TODAY, Feb. 9, 1993, at 4C (Doug Williams, former NFL All-Pro, and the only Black quarterback to win the Super Bowl, asserting that “what black agents don’t have is access to the
professional capabilities of black agents,77 (F) the “colder ice syndrome,”78 (G) the “crabs-in-the-barrel” phenomenon,79 (H) the success of a few token black agents, and (I) the pipeline problem.

Gunnar Myrdal’s concept of the vicious circle80 is indicative of the perils that the aforementioned problems perpetuate, as each problem re-enforces the other.81 Myrdal’s conception of the vicious circle attributed the lack of economic success in the black community to white prejudice and discrimination.82 As a result of this prejudice and discrimination, blacks receive lower levels of “living, health, education, manners and morals.”83 Based on these deficiencies, whites believe that their prejudice is justified. The result is a vicious circle wherein white prejudice creates substantial disparity in the black community and this disparity reinforces white prejudice.84 In light of this problem, Myrdal perceived that a positive change in any one of these factors would have the impact of moving the entire system in a positive direction.85 No single factor, therefore, is the “final cause” in a theoretical sense. This same explanation is indicative of the perils that face black agents. For example, the media’s negative portrayal of

77 KENNETH L. SHROPSHIRE & TIMOTHY DAVIS, THE BUSINESS OF SPORTS AGENTS, 1 (2d ed., Univ. of P.A. Press 2008) (“Take for example the HBO series ‘Arliess’ or the 1996 hit movie ‘Jerry Maguire,’ where Tom Cruise plays a shrewd agent who represents a somewhat emotionally unbridled black football player. The media typically projects the sports agent as a white male. There are very few, if any, opportunities for a black athlete to see portrayals of a black man or woman as a competent negotiator.”).
78 Shropshire, supra note 21, at 133.
79 David Aldridge, Agents of Change See Slow Progress in Sports, ESPN, February 28, 2008 http://espn.go.com/columns/aldridge_david/1342031.html (quoting David Ware, “The argument used to be that there was an absence of competent black agents,” says Bill Strickland, who, along with partner Mason Ashe, represents 30 to 40 athletes and entertainers, including Allan Houston, Rasheed Wallace and Daunte Culpepper. “I don’t think that’s the case any longer. But now you see players saying ‘There are no black owners, so white guys can deal with other white guys better.’ ”).
81 Id. supra note 72, at 75.
82 Id.
83 Id.
84 Id.
85 Id.
This perception adds credibility to the rhetoric of white agents in their attack of black agents. As a result, black athletes select white agents at disproportionately high levels, which enhances the financial resources and relationships that white agents have to seductively recruit black athletes. Much like Myrdal’s explanation of the factors that contribute to the socio-economic perils of the black community, a positive change in any one of the aforementioned factors will move the system in a positive direction. In this regard, the Rooney Rule has the capacity to move the system in a positive direction such that more black athletes will select black agents. In summary, if black athletes see black head coaches, the myth that blacks are incapable of successfully occupying leadership, strategic, and decision making positions will disappear. If this myth is dispelled, more black athletes will have higher levels of efficacy in hiring black agents because they will be able to appreciate that other blacks may be able to exhibit these types of qualities. If this happens, more black athletes will select black agents and if more black agents represent black athletes, black agents will have greater resources to recruit black athletes. Moreover, as those resources increase, the credibility of the black agents will significantly improve.

A. The Historical Allegiance of Black Athletes to White Agents: “The Never Bite the Hand That Feeds You Syndrome.”

The white sports world gained a significant advantage over black athletes as a result of integration. Through the process of integration, the black athlete was devalued into a basic source of cheap labor. This devaluation substantially impaired the role of the black professional. When black athletes were integrated into professional sports leagues, instead of

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86 Shropshire, supra note 77, at 58.
working with black professionals to protect their interests they relied heavily upon white professionals whose primary intent was to exploit the labors of the black athlete. Because of this early relationship, a foundation of disdain for black professionals and an affinity for white agents was forged. To some extent, integration reduced the black athlete into a modern-day slave whose sole existence is predicated upon the handouts of white owners, lawyers, accountants, and yes, coaches. While black players account for 80% of the players in the NBA, 65% of the players in the NFL, and 10% of the players in MLB, the overwhelming majority of the owners, coaches and administrators in professional sports are white while black owners are essentially nonexistent. In fact, it was not until 2003 that a black person finally became a majority owner of a professional sports team when Robert L. Johnson assumed control of the Charlotte Bobcats. "Black athletes have taken pro sports to a higher level. But when it comes to who coaches, who manages, and who gets administration positions, athletics is strictly a white man's game." Had integration never occurred, this story might have been completely different. If Jackie Robinson had never broken the color barrier in baseball, it is highly likely that the Negro Baseball leagues would have continued to grow as these leagues had developed a viable financial base and a quality product.

Robinson's success opened the floodgates for a steady stream of black players into organized baseball. Robinson was shortly joined in Brooklyn by Negro League

90 Id. http://www.lasentinel.net/Blacked-Out.html
92 NBA.com, Robert Johnson Owner, Charlotte NBA Franchise/WNBA Sting, http://www.nba.com/bobcats/robert_johnson_bio.html (last visited May 20, 2010) (At the time Johnson took over the Bobcats, the ownership group also included NBA icon Michael Jordan, former NBA player M.L. Carr and entertainer Nelly.)
stars Roy Campanella, Joe Black and Don Newcombe, and Larry Doby became the American League's first black star with the Cleveland Indians. By 1952 there were 150 black players in organized baseball, and the "cream of the crop" had been lured from Negro League rosters to the integrated minors and majors. During the four years immediately following Robinson's debut with the Dodgers virtually all of the Negro Leagues’ best talent had either left the league for opportunities with integrated teams or had grown too old to attract the attention of major league scouts. With this sudden and dramatic departure of talent black team owners witnessed a financially devastating decline in attendance at Negro League games. The attention of black fans had forever turned to the integrated major leagues, and the handwriting was on the wall for the Negro Leagues. The Negro National League disbanded after the 1949 season, never to return. After a long and successful run black baseball's senior circuit was no longer a viable commercial enterprise. Though the Negro American League continued on throughout the 1950s, it had lost the bulk of its talent and virtually all of its fan appeal. After a decade of operating as a shadow of its former self, the league closed its doors for good in 1962.\footnote{Negroleaguebaseball.com, Negro League History 101, http://www.negroleaguebaseball.com/history101.html (last visited May 20,2010).}

Moreover, had the Negro Leagues been successful it is also likely that they would have inspired other black professional leagues. Such leagues would have been owned and operated by other blacks and even more importantly, the economic benefits of these leagues would have directly benefited the black community as the owners and stakeholders would have been black. In addition, it is more likely that other black professionals would have had a larger role in representing black athletes as the players in these leagues would have firsthand experience in observing blacks in positions of power. While the black athlete may believe that he is the master of his own fate, integration weakened the black athlete’s power to leverage his own value.\footnote{Walter, supra note 14.}

Because the white man “gave” the black athlete “opportunity” the black athlete developed a strong sense of loyalty to whiteness. This unbridled loyalty is what I refer to as the “never bite the hand that feeds you syndrome.” This syndrome has coaxed the black athlete into embracing white representation as appreciation for black opportunity. From the perspective of the black athlete, it is the white owner who “blesses” him with the opportunity to play in “the league,” it is
the white man who coaches his team to the championship, and more importantly, it is the white man who signs the check that allows him to live the “American Dream.” Because the white man “gives the black athlete “opportunity,” the black athlete implicitly continues to feel a strong sense of obligation to the white power structure. This sense of obligation has weakened the power of the black professional and thereby the power of the black agent, those persons who actually have the capacity to protect the interests of the black athlete and the black community as a whole.  

B. The Alleged Lack of Competent Black Agents

Some whites have traditionally assumed that blacks are intellectually inferior. Surprisingly, those who advance this concept of black intellectual inferiority rarely admit that their perceptions are racist. In fact, they believe that the intellectual disparity between whites and blacks occurs as a result of the “way things are” rather than as a function of racist stereotypes. This belief was made readily apparent through James Watson’s racist comments in a 2007 interview in which he implicitly stated that blacks are genetically inferior to whites. More specifically, Watson articulated that he was “inherently gloomy about the prospect of Africa because all our (European) social policies are based on the fact that their intelligence is

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96 See generally Shropshire, supra note 21. (explaining that agents did not become part of the process until the 1960s as a result of several reasons: more importantly, black agents were not involved at these early stages and as such were not part of the foundational development).

97 See also CHARLES A. MURRAY & RICHARD J. HERRNSTEIN, THE BELL CURVE, (4th ed. 1994) (suggesting that differences in IQ were genetic and discussed the implications of a racial divide in intelligence. The work was heavily criticized across the world, in particular by leading scientists who described it as a work of “scientific racism.”).

98 See generally James Watson – Biography, http://nobelprize.org/nobel_prizes/medicine/laureates/1962/watson-bio.html, for a discussion on the Nobel Prize winner’s work in helping to decipher the structure of DNA. Watson also played a significant role in making one of the most dynamic discoveries of the 21st century.

the same as ours — whereas all the testing says not really.” He also commented that there is “no reason to believe different races separated by geography should have evolved identically,” and that while he hoped everyone was equal, “people who have to deal with black employees find this is not true.” The most troublesome aspect of Watson’s comments are not the comments themselves, but their origin. Watson is a scientist. His reputation was developed as a result of supporting scientific hypotheses with concrete scientific evidence. In spite of his experience and training, he still managed to make these biased, unsubstantiated, and unintelligent remarks. As a result of the backlash that Watson received from his comments, he issued a statement apologizing “unreservedly.” Moreover, he admitted that “there is no scientific basis for such a belief.” However, even when some whites learn that these claims are ridiculous and unfounded, via an admission by the original source that the information is wrong or through highly probative scientific evidence that such sentiments make no sense, they continue to make these types of comments and harbor racist beliefs. The essence of the type of bigotry exhibited by Watson does not limit itself to the general social context. As Professor Shropshire points out in his book “In Black and White: Race and Sports in America,” racism continues to bounce its way onto the playing field. If blacks have inferior DNA, lack the intelligence to lead a

101 Nugent, supra note 100.
102 Cahal Milmo, Fury at DNA Pioneer’s Theory: Africans are less intelligent than Westerners, THE INDEPENDENT, Oct. 17, 2007, at 1, available at http://www.independent.co.uk/news/science/fury-at-dna-pioneers-theory-africans-are-less-intelligent-than-westerners-394898.html (“Keith Vaz, the Labour chairman of the Home Affairs Select Committee, said: ‘It is sad to see a scientist of such achievement making such baseless, unscientific and extremely offensive comments. I am sure the scientific community will roundly reject what appear to be Dr Watson’s personal prejudices.’ … Steven Rose, a professor of biological sciences at the Open University and a founder member of the Society for Social Responsibility in Science, said: ‘This is Watson at his most scandalous. He has said similar things about women before but I have never heard him get into this racist terrain. If he knew the literature in the subject he would know he was out of his depth scientifically, quite apart from socially and politically.’”).
103 Shropshire, supra note 21, at 21-24 (highlighting the racist comments from Al Campanis, an executive for the Los Angeles Dodgers; Jimmy Synder, and Marge Schott, each of which lend credibility to the position that whites do not believe they are racist but rather stating the obvious truth).
team, can’t swim, are more genetically suited for breeding freak athletes, and are incapable of thinking critically, “obviously” they cannot be agents or coaches.

C. The Negative Rhetoric of White Agents

Black athletes are explicitly and implicitly presented with the notion that white agents are significantly better than black agents. Not only is this mentality prevalent in the sports context but it is ingrained in American society. Because of this perception, black athletes are less likely to hire black agents and instead, overwhelmingly, choose to be represented by white agents. Armed with this perception, white agents are able to “steer black athletes into their coffers by slandering black agents with clichés such as ‘they don’t have the experience’ or ‘he lacks the right contacts.’” In light of these comments, agents have no real capacity to influence where an athlete gets drafted as that determination is made primarily by the athlete’s own abilities. However, athletes generally believe that it is the agent’s “magic” that determines their draft status. Accordingly, the negative rhetoric of white agents works to make black athletes believe that white agents can magically improve their draft status. This is completely inaccurate. Agents cannot actually affect an athlete’s draft status. Although agents cannot generally affect an athlete’s draft status, some agents, traditionally white agents, have special relationships that create leverage in other aspects of an athlete’s relationship with a team. “American sports deals are more often an art than a science, and intangibles such as relationships can sometimes trump the bottom line.” A great example of the importance of special relationships is

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104 Shropshire, supra note 21, at 21-24.
105 Shropshire, supra note 21, at 21-24.
106 Shropshire, supra note 21, at 21-24.
107 Shropshire, supra note 21, at 21-24.
108 Shropshire, supra note 77, at 125.
109 Id.
110 Id.
exemplified by Mark Bartelstein’s negotiation of Darius Songaila’s contract in 2004 with the Sacramento Kings. When Songaila’s contract came up for renewal, he was strongly contemplating accepting an offer from the Chicago Bulls; however, he really wanted to remain a member of the Kings. The Kings possessed the ability to match the offer but had taken a very strong position during the negotiation of the contract. Part of the reason that the Kings had taken such a strong position was predicated upon the fact that Bartelstein had little to offer the Kings in return.

So, with nothing to offer, Bartelstein went to the King's operating chief, whom he considers a friend, and asked for a favor. "I went to Jeff [Petrie] and said, 'Would you do the right thing for Darius?'" Bartelstein recalls, at which point Petrie backed off the negotiations. Bartelstein believes the implicit agreement was that he would remember the goodwill in the future when it came to marketing the Kings to clients. "He knows I'm not going to forget he did something for me," says Bartelstein. Because few black agents have the contacts to create these types of special relationships, black agents are at a significant disadvantage.

D. The seductive resources white agents possess to court black athletes

Since white agents represent the majority of athletes, including those athletes that sign the largest deals, their economic resources are the greatest. For some agents, the fees generated from client representation can be quite lucrative. With these fees, top agents are able to attract

2010) (discussing Shropshire’s insights from a recent presentation titled, "Negotiate like the Pros: Negotiation Lessons from Sports for Business").


Stuart, supra note 112.

Stuart, supra note 112.

Stuart, supra note 112.

Stuart, supra note 112.

Lisa Pike Masteralexis et al., Principals and Practice of Sport Management 246 (2d ed. Jones and Bartlett Publishers) (1999) (explaining how agent fees are generally determined by the players associations and are largely contingent upon whether the players association limits fees. Generally, fees are usually based on one of four methods: (1) the flat fee, (2) the percentage of compensation, (3) an hourly rate; or (4) an hourly rate with a percentage of compensation cap.); See also Shropshire supra note 77. (stating that competition among agents has the impact of forcing agent compensation downward).

See generally, Masteralexis, supra note 117, at 246-248
more clients. For example, one agent promised prospective clients romantic liaisons with supermodels from New York’s Wilhelmina Models Inc. modeling agency. More recently, after an eight-month investigation by Yahoo! Sports, it was determined that Reggie Bush and his family received financial benefits in excess of $100,000 during his college playing days, as he was being courted by new, white start-up marketing firms.

If this is what it takes to get some clients, it is obvious that financial resources are very important. Some of the payments provided to athletes violate NCAA regulations as well state laws, yet they have become an integral part of the recruiting process. As such, those agents that have the financial resources to “play the game” have a substantially higher prospect of signing a potential client. Because black agents have been traditionally excluded from the process, and

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119 Sammataro, supra note 74, at 539.
120 Shropshire, supra note 77, at 58. (“Norby Walters and Lloyd Bloom paid more than $800,000 in varying sums to approximately fifty athletes, five of whom were first-round picks in the 1987 NFL draft. Similarly, agent Jim Abernethy claims that he spent more than $500,000 on a one-year periods in recruiting clients. Other specific overzealous recruiting techniques reportedly include the following: the offer of one-third of an agent’s management corporation to George Rogers; a series of incidents involving Florida State football players that culminated in one agent taking several players on a $6,000 shopping spree at Foot Locker in 1994; agent Robert Caron’s alleged cash payments totaling $3,900 to University of Southern California football player Shawn Walters; the payment of a $2,500 promissory note to University of Alabama basketball star Derrick McKey; Auburn basketball player Chris Porter’s acceptance of $2,500 from an agent; agent Jeffrey Nalley’s purchase of $1,000 worth of clothing for Penn State star Curtis Enis; the offer of $65,000 to former Louisiana State linebacker Michael Brooks; allegations that one Florida player received wheel rims valued at $1,500 and another received weekly payments totaling up to $500 per month…”).

121 See generally, Reggie Bush – Profile, http://www.nfl.com/players/reggiebush/profile?id=BUS294963, for a discussion on the New Orleans Saints superstar who was a first round draft pick in the 2006 draft.
122 Espn.com, Bush ’Not Worried’ About Illegal Benefit Allegations, http://sports.espn.go.com/nfl/news/story?id=2588347 (last visited May 20, 2010) (“Suits for Bush's stepfather and brother to wear during the Dec. 10, 2005, Heisman ceremony in New York, a makeover for his mother for the event and limousine transportation -- all paid for by Ornstein. Two hotel stays by Bush, one in Las Vegas and another in San Diego, in March 2005. In both instances, the rooms were paid for by Michael Michaels, a marketing agency investor who wanted to represent the football star; $13,000 from Michaels' fledgling firm, New Era Sports & Entertainment, to purchase and modify a car for Bush; $595.20 in round-trip airfare from San Diego to Oakland in November 2005 for Bush's stepfather, LaMar Griffin, his mother, Denise Griffin and younger brother to attend the USC-California game at Berkeley. The charges were put on a credit card belonging to Jamie Fritz, one of Ornstein's employees… Speculation over whether Bush and his family received money arose earlier this year in reports that his mother and stepfather didn't pay $54,000 in rent during the year they lived in a house owned by Michaels, who later said the family promised to repay him once Bush went pro.”).
123 Shropshire supra note 77, at 57. (stating that today’s athletes have been provided with benefits from an early age. As a result, their mentality is what can you do for me now, what can you do for my family. Essentially, how can you change my position financially?).
often lack the financial resources of their white counterparts, it is often difficult for them to offer the same type of “benefits.”

Not all agents are corrupt or violate the law; however, money has become a substantial part of the recruitment of athletes, and those who have it have a substantially greater chance to sign an athlete. If an agent has greater economic resources they can spend more time flying to see a potential client play as well as spend more time flying to meet the athlete’s parents. More money also means that the agent will have a greater ability to put together flashy presentations to recruit potential athletes. Money may be even more important after an athlete signs the deal, especially in the context of an athlete who has yet to be drafted, as it is the agent who lavishes the athlete with his financial desires such as cars, spending money, houses, living expenses, and clothes for the draft etc. More importantly, it is the agent who foots the bill for the athlete to obtain expensive combine training.

E. **The Media's Disparaging Portrayal of the Professional Capabilities of Black Agents**

Have you ever heard of Thomas Collins, Norby Walters or Steve Weinberg? I had not and I consider myself to be quite the sports enthusiast. To be sure that I was not merely overlooking an obvious sports fact, I anecdotally asked a few people, both white and black, about the aforementioned individuals and no one I asked recognized these names. However, I asked

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124 Kenneth Shropshire, *Sports Agents, Role Models, and Race-Consciousness*, 6 Marq. Sports L.J. 267, 277 (1996) (“Williams recognizes a disparity that is present with most African-American agents. ‘What they don't have access to is the same type of clientele. Most black agents don't have the resources or contacts to fly in players, advance them money or get them a loan for the car of their dreams like a lot of white agents can.’ Williams further recognized that a top round draft pick ‘can do more for black agents than the law allows.’ This is true because in the sports agent business an agent's success lies largely in his or her client pool. ‘Who else do you represent?’ is the first question asked by most prospective athlete-clients.”).

125 Shropshire, supra note 21, at 187


127 Tom Morino, *The Scouting Combine’s Role in Pro Scouting*, SCOUT, Dec. 10, 2008 http://profootball.scout.com/2/820118.html (explaining that the combines were formed to enable pro-football clubs to scout recruits in a centralized location).
these same people whether they had ever heard of Sean Jones\textsuperscript{128}, Tank Black\textsuperscript{129}, or Leland Hardy\textsuperscript{130} and although none of them knew their stories, they each indicated that they vaguely remember hearing “something about them getting into trouble.” Collins, Walters and Weinberg are white sports agents who engaged in unethical and criminal practices in representing their clients. Collins was the business manager of former NBA great Kareem Abdul-Jabber.\textsuperscript{131} Abdul-Jabbar gave Collins power of attorney over his financial affairs to act in Abdul-Jabbar’s best interest.\textsuperscript{132} Yet, Collins mishandled Abdul-Jabbar’s finances. As a result, Abdul-Jabbar was placed in financial peril and in light of all of his success and career earnings, he was forced to borrow money to pay his bills towards the end of his career.\textsuperscript{133} Walters possibly engaged in an even greater injustice. Walters along with one of his partners, Lloyd Bloom, was indicted after “a 17-month FBI investigation by a federal grand jury for conspiracy, RICO\textsuperscript{134} violations (the

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\textsuperscript{128} Timothy Davis, Regulating the Athlete-Agent Industry: Intended and Unintended Consequences 2 (May 2006, Wake Forest Univ. Legal Studies, Paper No. 900620, May 2006), available at http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=289903 (“Sean Jones was a former NFL football player turned sports agent that was involved in a number of unethical transactions. In 2003, Jones “was de-certified as an agent by the NFL Players Association because of his financial dealings with one of his clients, Dallas Cowboy, Ebenezer Ekuban. “Jones persuaded Ekuban to guarantee a one million dollar real estate loan that ultimately defaulted; and to lend Jones $300,000, some of which was never repaid.” Chris Dishman, a former NFL football player that was represented by Jones, alleged that Jones engaged in unauthorized trading with his account. The National Association of Securities Dealers awarded Dishman $550,000 in damages; however, Dishman did not collect any money from the judgment because “It got too expensive to keep trying to track [Jones] down. I didn’t have the money to keep fighting it. I didn’t win anything.” Jones was also indicted on bank fraud charges. It was alleged that he and four others “ran a scheme to pocket portions of more than $42 million in mortgage loans,” by acquiring mortgage loans far in excess of the properties’ value and then diverting the money for personal use.”

\textsuperscript{129} Aldridge, supra note 79. (“William “Tank” Black was convicted in Florida of fraud, conspiracy and obstruction of justice charges last year. Black, who also represented Vince Carter, was accused of stealing up to $14 million from his prominent football clients, including Fred Taylor, Terry Allen and Jacquez Green. In the wake of the scandal, other African-American agents say that white agents have used Black’s conviction to taint all African-American agents.”).

\textsuperscript{130} Aldridge, supra note 79.


\textsuperscript{132} Papanek, supra note 131.

\textsuperscript{133} This is extremely ironic considering Abdul Jabbar was earning approximately two million dollars a year. Eventually, Abdul-Jabbar and Collins settled out of court.

predicate felony was extortion), and mail fraud.” 135Walters illegally signed more than 40 athletes to representation contracts before their collegiate eligibility expired. When several of the athletes declined to honor their agent-representation agreement with Walters, or return the gifts that he had provided, he threatened the athletes with physical violence.136 In regards to the athletes who actually honored their agreements with Walters, several of them were tricked into investing in fraudulent investment shams.137 Weinberg was also an unscrupulous character. He diverted assets into an off-shore trust account to avoid paying a financial judgment he owed to a former business partner.138 This diversion left Weinberg’s clients open to having some of their wages garnished as well as unnecessary legal proceedings as a means of satisfying Weinberg’s obligation.139 Weinberg was also charged with violating another union regulation when he purportedly arranged to get one of his clients to make a $115,000 payment before it was due.140

San Francisco attorney Edward King Jr., the undisputed leader in representing players in suits against agents, says that although “there’s no scientific study of the percentage of players that have been abused somehow in their investments, it’s in the high nineties - virtually all of them are abused. The question is -- to what degree.”141 If King’s point is accurate, why is it that we know more about the improprieties of black agents than we know about white agents?142

Additionally, if the percentage of athletes that are abused is in the high nineties, then the

136 Selcraig, supra note 135.
137 Selcraig, supra note 135.
139 Bounds, supra note 138.
140 Bounds, supra note 138.
142 Aldridge, supra note 79. (“[A] white guy can screw up two or three times, and still be in the business. When Tank Black screwed up, black agents and their clients heard about it. It was used by white agents in the recruiting wars, that we were incompetent.”).
overwhelming majority of abusive agents are white since it is the white sports agent that represents the greatest percentage of black athletes. Because of the limited number of black agents who represent NFL players, when one makes a mistake it has a much larger negative impact on the reputation of black agents as a whole. Even more troubling is the fact that when the media is proven wrong or finds credible evidence that the position is unfounded, it does not spend as much time correcting the inaccurate portrayal as it does in facilitating it. As a result, the negative image of the black agent is perpetuated while the image of the white agent remains disproportionately more favorable.

F. The “colder ice syndrome”

“The difficulty for Blacks in sports management is getting over the mental block that many athletes and their parents have about dealing with other Blacks. So many Black people still believe that the white man is magic, that his ice is colder.”143 Why is it that some blacks consistently fail to support their own or believe that the white man’s ways are better? Sadly, this phenomenon occurs rather frequently.144 To some blacks, whiteness is a signpost for success and achievement. The “colder ice” story helps to explain this syndrome.145

According to the tale, in a small, southern town on an extremely hot day, a long line of people waited to purchase ice. Yet, on the other side of town a black ice vendor sat with an abundance of ice doing very little business. When a black patron in the long line was asked why he stood in the long line rather than purchasing the ice in his own neighborhood, he quickly retorted, “well everybody knows that the white man’s ice is colder.”146

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144 Shropshire, supra note 124, at 269.
145 Shropshire, supra note 124, at 269 (“Many people attribute this story to Malcolm X, however, there is at least some indication that the origins are unknown.”). See generally Russell J. Rickford, Betty Shabazz, Surviving Malcolm X: A Journey of Strength From Wife to Widow to Heroine (Sourcebooks 1995) (the ice story was a joke that was run in the Detroit newspaper).
146 Rickford, supra note 145, at 8.
Quite often the colder ice syndrome has been used to explain why black athletes select white agents for representation at disproportionately higher levels than black agents.\footnote{Shropshire, supra note 124, at 269. See also Sammataro, supra note 74, at 548.}

For whatever reason, high-profile black athletes, although they talk a real good game when it comes to social responsibility and social awareness, when it comes to their business, they still have somewhat of a plantation mentality, that the other guy's ice is colder, his water is wetter, and his liquor will get you drunker.\footnote{Aldridge, supra note 79.}

In the context of player representation, Professor Shropshire has commented that there is at least some support for the proposition that black athletes may unconsciously believe that white agents are somehow better negotiators.\footnote{Shropshire, supra note 124, at 275.} This misperception might bolster the belief that white agents are somehow inherently better than their black counterparts and add fuel to the "colder ice" syndrome. As Johnnie Cochran opined, "sometimes it is better for an athlete to have an attorney who walked in their shoes. I think some athletes have become completely brainwashed by whites to think that white attorneys are better than black attorneys…. Some black athletes have a plantation mentality."\footnote{Mike Freeman, Cochran the Agent? It Could Work, NY TIMES, July 25 1997, at 13, available at http://www.nytimes.com/1997/07/25/sports/cochran-the-agent-it-could-work.html?scp=501&sq=spike+lee&st=nyt.} "[S]ome players don't take advantage of a major resource - black lawyers and sports agents." "Some players think the ice is colder in someone else's glass."\footnote{David Aldridge, Agents of Change See Slow Progress in Sports, Feb. 28, 2002, http://espn.go.com/columns/aldrige_david/1342031.html. "It freezes at 32 degrees Fahrenheit, 0 degrees Celsius. It does this everywhere on earth. No matter what glass it's in, or whose glass it is."}

G. The "crabs-in-the-barrel" syndrome

The crabs-in-the-barrel syndrome is a metaphor that is often used to explain what happens when blacks are successful, only to be pulled down by members of their own race. The phrase refers to the conduct of crabs when they are placed in a barrel. Allegedly, when crabs are placed in a barrel and one crab attempts to climb to the top, every time that crab nears escape,
another crab reaches up to pull the crab back down into the barrel. With respect to black agents, they are pulled back into the barrel by both black players and other black agents. One famous quote from arguably one of the greatest receivers to ever play in the NFL, Randy Moss, who was “wooed” by Johnnie Cochran but ultimately signed with Bus Cook, a white agent, stated that “My agent’s got THE MAN… Who’s Johnnie Cochran got?” Clearly, it is Moss’s prerogative to select whomever he desires for representation; however, he did not have to attack another black man in the process. The impact of Moss’s quote is even more troubling considering that Bus Cook prominently displays this quote on the first page of his website. The message from this quote is clear, the top black player in the NFL, especially at the time the quote was made, wants the “top agent,” a white man, and therefore you should want him too. Black agents are also attacked by other black agents. According to Andre Farr, Chairman and President of Black Sport Agents Associations (“BSAA”), “There's a lot of defamation of character among black agents…. If a black player is being recruited by four black agents and one white one, it’s not uncommon for the four black agents to slander each other and the player to go to the white agent.” To remedy this situation, black players and black agents need to

152 Eric Easter, Crabs in a Barrel, EBY, May 1, 2008, available at http://www.ebonyjet.com/national/crabsinbarrel.aspx (“Contrary to popular belief, the crabs don't necessarily try to get away. More commonly they will generally use their hind legs to attempt to move into a defensive posture, simultaneously lifting their claws in expectation of an attack.” Once a handler grabs the crab that is sitting in the defensive posture to remove him from the barrel the other crabs will reach up and grab it; however, it is not known whether they crab onto the crab to keep him from getting free or whether they are banding together to form a solid, impenetrable barrier akin to the Spartans when they defended Thermopylae. A tactic that says ‘if you attack one of us, you attack all of us and we have each other's backs no matter what.’” If the latter is true, the crabs in the barrel syndrome may not be an accurate metaphor for describing Black people.”).


realize that their destinies are intertwined and must make a greater effort to work together. Additionally, more black agents need to get involved with organizations that were created for the primary purpose of addressing these problems like the FPA, the BCA and the BSAA.\footnote{157}

**H. The limited success of a few token black agents has reduced the importance of the diversity advancement.**

My mentor, andre douglas pond cummings, once told me a story about a former minority law student of his who had an interest in a career as a sports agent. The student was lucky enough to secure an internship with a prominent white sports agent. During the student’s internship, the agent promised the student that he would have a job with the agency upon graduation and that he would receive a commission if he was able to secure a certain high profile minority athlete. The student worked diligently to recruit the athlete and as a result, the athlete ultimately signed with the agent. However, the agent never followed through with his promise to hire the student or pay the commission. The student was exploited and taken advantage of because of his race. The agent only selected the student because he recognized that the young minority student had a greater potential to sign the athlete than a sixty plus year old white man. This is a clear example of an obvious truth – that white agents recognize that black athletes are better served by having an agent of their own race. This is evidenced by the fact that many predominately white agencies now employ “token blacks”\footnote{158} as front men to recruit black athletes. In light of this fact, white agents continue to remain the major decision makers as well as the primary earners. These white agencies have not diversified their ranks in effort to promote the black agent; instead they have merely hired token blacks as a means of further exploiting the black athlete.

\footnote{157}{See infra p. 45 and note 245} \footnote{158}{Tanber, supra note 19.}
Moreover, the minor “successes” of a few black agents has led to a decreased interest in promoting the importance of the black agent. As Lamont Smith explains, “the moderate success achieved by a small group of African-American agents has caused the diversity advancement to become a non-issue.”¹⁵⁹

I. The Pipeline Problem

Another critical factor affecting why minority NFL athletes disproportionately select white agents is the pipeline problem. Because there are so few minorities in leadership and decision making positions, other minorities develop a perception that minorities are inferior and incapable of performing these functions. Accordingly, minorities rarely get an opportunity to prove that they are capable of executing these tasks. As a result of this reality, minorities are prevented from creating a pipeline of experience. Without this pipeline, they are unable to compete at the same level as whites.

The aforementioned problem begins to take shape at a very early age. Often times, the most talented black youth athletes end up playing in suburban football leagues. This is partly due to the fact that there is a perception that urban leagues are less organized and have inferior coaching and inadequate facilities. These perceptions are wholly inaccurate. The real problem is that many urban youth leagues suffer from a lack of financial resources, a problem that is less prevalent in suburban leagues. As a result, black youth who are interested in playing youth football are directed to suburban leagues where white males dominate. Minority parents drive their children to these suburban leagues to give their children what they consider to be a better athletic experience. This reinforces the notion that the "white man's ice is colder" at a very early age. Not surprisingly, this problem is more pervasive among minority football players than it is among minority basketball players. As Lamont Smith notes, basketball players have a different

¹⁵⁹ Tanber, supra note 19.
mentality than football players when choosing their agents.”\textsuperscript{160} According to Smith, black football players have “little exposure to African-American authority figures.”\textsuperscript{161} "The NBA has been promoting African-Americans in upper management levels for a long time, so they are more visible to the players…. Also, the young kids [that play basketball] have had African-American coaches in their lives before they go to high school. On the football side, most of the people the young players have contact with are not African-American.”\textsuperscript{162}

This disparity is partially due to the fact that it takes more money to organize a football team than to organize a basketball team. For example, the typical cost for one player to play youth football is approximately $600 and each team might have approximately 20 players for a total team cost of $12,000.\textsuperscript{163} The typical expenses per player might include the following: a youth football helmet ($250), youth shoulder pads ($100), youth leg and arm pads ($75), youth cleats ($75), and a youth uniform ($100).\textsuperscript{164} Basketball is far less expensive; the only cost is the cost of a uniform. Because of these cost disparities, it is much easier to organize a basketball team. This may explain why there are far more successful minority youth basketball leagues in the urban community than successful minority youth football leagues. Because of this reality, basketball players have a different mentality and as a result there are far more black coaches, owners, and general managers than in the NFL. \textsuperscript{165} In the context of the NBA, “blacks are really starting to take center stage.”\textsuperscript{166}

“In this year’s draft [2007] three prominent African American agents have signed most of the top lottery talent. Those three agents are Aaron Goodwin, Bill Duffy, and Bill Strickland. Duffy and Goodwin have emerged over the last ten to fifteen years, while Strickland is an old veteran who recently decided to jump back in the

\begin{itemize}
\item \textsuperscript{160} Tanber, \textit{supra} note 19.
\item \textsuperscript{161} Tanber, \textit{supra} note 19.
\item \textsuperscript{162} Tanber, \textit{supra} note 19.
\item \textsuperscript{164} FootballAmerica.com, \textit{supra} note 163.
\item \textsuperscript{165} Tanber, \textit{supra} note 19.
game. Since 1998, Duffy and Aaron Goodwin have represented four of the possible nine number one overall draft picks (Goodwin with LeBron James in 03 and Dwight Howard in 04 and Duffy with Michael Olowokandi in 98 and Yao Ming in 02). This season, either Goodwin or Duffy will again be associated with the number one overall pick, as Goodwin is representing University of Texas all-world prospect Kevin Durant, and Duffy (in conjunction with Mike Conley Sr.) is helping to represent Ohio State standout Greg Oden. Goodwin is also representing sure fire top five pick Al Horford in this year’s draft.167

The pipeline problem continues for minority football players into college. There are very few black head coaches in NCAA Division 1A college football. Currently, only seven (7), or roughly five percent, of the 120 coaches in NCAA Division 1A college football are black.168 In the NFL; however, blacks account for almost twenty-five percent of the head coaches and in division 1A college basketball blacks account for almost 30 percent of the head coaches.169

These figures are extremely surprising considering that approximately 50 percent of the athletes that participate in division one college football are black.”170 Moreover, there are only 12 minority coordinators at the schools that make up NCAA division one college football.171 Diversity is no greater in the NCAA’s lower football divisions, where minorities account for only six of the 115 head coaches in Division 1-AA, one of the 151 head coaches in Division 2, and four of the 231 in Division 3.172

167 Id.
168 SECFan, The College Football Voice, Black Coaches in NCAA Football: Breaking Barriers, http://www.collegefootballvoice.com/pb/black-coaches-in-ncaa-football/ (last visited Aug. 8, 2010). (Listing black coaches including, Randy Shannon at the University of Miami, Turner Gill at Kansas University, Kevin Sumlin at the University of Houston, Charlie Strong at the University of Louisville, Mike London at the University of Virginia, Ruffin McNeil at East Carolina University and Joker Phillips at the University of Kentucky).
170 Ford, supra note 169.
These racial disparities exacerbate another problem; if black coaches are not getting meaningful opportunities at the collegiate level it substantially impairs their ability to obtain meaningful opportunities in the NFL. As Tony Dungy noted:

February is . . . the month that high school football players choose the colleges they will attend in the fall. While it’s an exciting day for those seniors, it’s a disappointing day for me. You see, many of those players who choose the top schools are African-American and yet almost none of them will get the opportunity to play for an African-American head coach. Of 120 teams in the N.C.A.A.’s Bowl Subdivision, the top tier of play, only seven have black head coaches. One would think that our universities would be leading the way in progressive thinking. You wouldn’t think that in 2009 it would be more likely for an African-American to become the president of the United States than to be hired as head coach of a top-20 football program. But that seems to be the case.\footnote{Tony Dungy, Diversity Everywhere but the Sidelines, NY TIMES, Feb. 20, 2009, at 31 available at http://www.nytimes.com/2009/02/20/opinion/20dungy.html.}

In addition, the black athlete also suffers because of the lack of black head coaches at the collegiate level. It is well documented that black athletes graduate at lower levels than white athletes. When compared to their counterparts, Black football players graduate at a 50% graduation rate while their white counterparts graduate at a 64% graduation rate.\footnote{Gregory Moore, Black Student – Athletes Are Making Strides, BLACK ATHLETE, Dec. 8, 2007, http://www.blackathlete.net/artman2/publish/CollegeSports_24/Black_Student-Athletes_Are_Making_Strides.shtml (“African American football players at the 120 Football Bowl Subdivision schools (the schools in which they are recognized to take part in the 32 bowl games if selected) graduate at a much higher rate than their non-football player counterparts; 50% vs. 37%.”).}

This disparity is likely a direct result of the low number of black head coaches in division one college football. As noted below, there is at least some evidence to suggest that same race teachers may inspire greater academic capacity. As such, is highly likely that a same race coach may inspire a similar type of improvement. Because of this possibility, the NCAA must take affirmative steps to remedy this issue. It must adopt a Rooney Rule type rule at the collegiate level.\footnote{Kevin M. Yurkerwich, Diversity in the NFL, THE TECH, Feb. 3, 2004, http://tech.mit.edu/V124/N1/Minorities_in_N.Fl.html (“[F]or those schools that fail to comply with such a rule, ‘the
These realities have a detrimental impact on black agents as well.

What message is sent to African-American athletes when they watch a professional sports draft and see only whites in positions of authority. Just as troubling to Smith and other African-American agents is that the top agents at the larger agencies, like CAA, are mostly white, creating a scenario in which numerous African-American athletes -- a number of them major stars -- have non-African-Americans running their business affairs. Smith recalls the first day of last year's NFL draft, when 14 out of the first 15 players selected were African-Americans, but only one -- Gaines Adams of Clemson -- selected an African-American agent, Fletcher Smith. "What kind of message are we sending to African-American athletes when on the first day of the draft they turn on the TV and all they see are white guys in decision-making roles?"

If an athlete is told by his parents that the suburban little league where the majority of the coaches and power brokers are white is better than the urban league where the majority of the coaches and power brokers are black; if that same child goes onto college and is coached by a white coach at a school where both the athletic director and the president/chancellor are white; if that athlete then turns on the TV to see that the majority of the coaches in the NFL are white, clearly that athlete is going to choose a white agent. The message is very clear, "The white man's ice is colder."

**Part IV: The Rooney Rule will help to “legitimize” the black agent in the eyes of the black athlete.**

Although black athletes rarely select black agents, the Rooney Rule has the capacity to change this fact. As the Rooney Rule increases the number of black coaches, more black athletes will have greater exposure to blacks in positions of power. As this occurs, black athletes will have greater levels of efficacy in selecting black agents. In general, black players in the NFL as opposed to black players in the NBA, have a different mentality during the agent-selection process.

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process and this is primarily due to the fact that black athletes have little exposure to black coaches.\textsuperscript{177} Again, the Rooney Rule may be a viable option for mitigating this problem.

The educational achievement gap research provides a strong example of the type of change that can be effectuated through the Rooney Rule. There is a growing body of research that suggests that black teachers may have a direct impact on the academic performance of black students.\textsuperscript{178} Thomas Dee discussed this phenomenon in his article entitled “Teachers, Race, and Student Achievement in a Randomized Experiment.”\textsuperscript{179} Dee identified two types of educational benefits, passive and active, that occur as a result of the presence of black teachers. According to Dee, these passive and active benefits help to explain why there is at least some connection between teacher race and student achievement.\textsuperscript{180} Passive benefits are those factors that affect student learning without any direct influence or action by the teacher.\textsuperscript{181} The most typical type of passive benefit is that of the role-model effect. The role-model effect necessitates that minority students will be motivated to achieve merely by the presence of a teacher of the

\textsuperscript{177} Tanber, supra note 19. (stating that although the NBA and NFL have roughly the same percentage of black players, NBA players are more likely to consider a black agent rather than their NFL counterparts, due to the fact that the NBA has been promoting blacks in upper management levels for a long time, so they are more visible to the players. Moreover, black players in the NBA are more likely to have had an interaction with a black coach or mentor at some point in during their career, whereas the same cannot be said with respect to black players in the NFL)

\textsuperscript{178} Ji, Chang-Ho, Color That Matters: Teacher-Pupil Race in Ethnic Minority Student’s Academic Performance. Paper presented at the annual meeting of the Southern Political Science Association, Hotel Intercontinental, New Orleans, LA, Jan 9, 2008. http://www.allacademic.com/meta/p208342_index.html. See also National Collaborative on Diversity in the Teaching Force, A Call to Action (2004), http://www.ate1.org/pubs/uploads/diversityreport.pdf (highlighting that a small but growing body of research shows that minorities tend to do better in class and face higher expectations when taught by teachers from…). See also Thomas S. Dee, The Race Connection: Are teachers more effective with students who share their ethnicity?, EDUCATION NEXT, Spring 2004, available at http://findarticles.com/p/articles/mi_m0MJG/is_2_4/ai_114479064/?tag=content;col1 (Among black children, the results indicate that having a black teacher for a year was associated with a statistically significant 3 to 5 percentile-point increase in math scores. On the reading test, the scores of black pupils with black teachers were 3 to 6 percentile points higher.”)

\textsuperscript{179} Dee, supra note 178(explaining that empirical research was used from the Tennessee's Project Student-Teacher Achievement Ratio ("STAR"). Project STAR was promulgated to study the impact of class size on student achievement. The research from this study supported the conclusion that students tend to perform better academically in smaller classes.).

\textsuperscript{180} Thomas S. Dee, Teachers, Race and Student Achievement in a Randomized Experiment (Nat’l Bureau of Econ. Research, Working Paper No. 8432, 2001).

\textsuperscript{181} Dee, supra note 180.
student’s own race. The mere presence of a minority teacher motivates minority students to achieve as such presence increases the minority student’s confidence and enthusiasm for learning.\textsuperscript{182} For a black student, a black teacher inspires opportunity regardless of the teacher’s behavior. The black teacher experience provides the black student with a model for their own success. In essence, success moves from dream to reality. The presence of a black teacher also reduces the impact of stereotype threat. Stereotype threat is a situational fear that one will be judged to have traits associated with negative stereotypes about one’s racial, ethnic, or social group.\textsuperscript{183} Although the stereotype threat may sound similar to the self fulfilling prophecy, the self fulfilling prophecy is distinctly different. Students that succumb to the self fulfilling prophecy actually believe the stereotype and its impact is more constant. However, the stereotype threat is not necessarily internalized by the student and is only situational. Because of this fear, the threat of a particular stereotype often results in increased anxiety and lower performance \textquotedblleft in situations where students perceive that stereotypes might attach (e.g., black students with white teachers, female students with male teachers)\textquotedblright.\textsuperscript{184} As a result, \textquotedblleft they experience an apprehension that retards their academic identification and subsequent achievement.\textquotedblright\textsuperscript{185} Dee’s research suggests that the presence of a same race teacher reduces the effects of stereotype threat because a same race teacher tends to inspire higher levels of self-worth among same race students. The problem with stereotype threat in the context of black students is that the applicable stereotype normally sets forth negative expectations and those

\textsuperscript{182} Dee, \textit{supra} note 180.


\textsuperscript{184} Thomas S. Dee, \textit{A Teacher Like Me: Does Race, Ethnicity or Gender Matter?}. 95 \textit{AM. ECONOMIC REVIEW}, 158-65 (2005).

\textsuperscript{185} Id.
expectations tend to be more powerful than positive expectations.\textsuperscript{186} Accordingly, if the tendency is that individuals focus on and are more influenced by negative versus positive information, negative expectations may create more powerful negative stereotype threats as well as negative self-fulfilling prophecies. Obviously this does not bode well for black students as they are often the focus of negative expectations. However, as noted above, the presence of a black teacher helps to reduce the power of negative stereotypes as the mere presence of a black teacher is discernible proof that the negative stereotype is untrue.

The presence of same race teachers also provides a set of what Dee describes as active benefits, “race specific patterns of behavior among teachers.”\textsuperscript{187} Through these race specific patterns of behavior, same race teachers actively engage same race students in ways that different race teachers cannot. For example, a black teacher might spend more time with a black student merely because they share a common background or because the black teacher can more readily identify with the black student’s struggles. Moreover, a black teacher may be able to communicate academic material more effectively by using real world examples that are consistent in the black community. These examples often help the black student’s academic understanding as the student can more easily relate.

If blacks are not represented as intelligent people, young black students will not believe that they can do certain jobs or that they possess the intellectual capacity to solve complex problems. It is not a coincidence that young black males aspire to be professional athletes; chiefly, football and basketball players. This is where they often find the greatest level of acceptance as well as an overwhelming representation. Accordingly, because of their athletic

\textsuperscript{186} Dee, \textit{supra} note 180, at 195-210. (“Also known as the Golem hypothesis, negative expectations lead to more powerful self-fulfilling prophecies because people generally consider negative information more useful than positive information. “The term ‘golem’ originates from Eastern European Jewish mythology in which the ‘Golem’ was a mechanical creature that was created to be a servant, but who turns into a monster.”). 

\textsuperscript{187} Dee, \textit{supra} note 180.
successes, some blacks tend to focus more on athletic endeavors rather than on academic
concerns or other professional interests.

The same active and passive benefits that are at play in the teacher student relationship
are also at play between black athletes and black coaches. Passively black coaches help dispel
the myth that blacks are unqualified to lead, that blacks are incapable of working in strategic
positions and more importantly, that blacks are less capable than their white counterparts. A
black coach is more likely to establish a closer player-coach relationship with a black athlete
based on the fact that they are more likely to share a common relationship and experience. In
addition, a black coach may also have increased expectations for the black athlete. Finally,
same race coaches and athletes are more likely to share similar interest and experiences which
may increase the likelihood of bonding.

Actively, black coaches are more likely to engage black athletes in ways that white
coaches cannot. For example, a black coach might make a greater effort to relate to a black
player given the fact that they share a common experience as blacks in professional football. As
such, a black coach may be better equipped to understand the social and communal pressures that
black athletes face. In addition, the presence of a black coach may also inspire black athletes to
assume team leadership roles.188

Through these active and passive benefits, black coaches can inspire the same benefits as
same race teachers. The Rooney Rule can have the same level of impact in increasing the
number of black agents as it has had with increasing the number of black coaches. As black

traditional role model issue - youngsters striving to be like their athlete role models. The logic, which relates to the
broader question raised here, is that if African-American athletes would patronize their own businesses, then young
African-Americans and others who look up to them would do the same as well.”) Although Professor Shropshire’s
key point is that other blacks will “go black” if their athlete role models do it, this same argument can be easily
extrapolated to explain the affect that black coaches can have on inspiring black athletes to assume other leadership
positions.
players see more blacks in positions of power, they will be positively influenced to think of
blacks in a more positive light. To see a black person at the front of a team perpetuates an image
that blacks are equally capable as whites. More importantly, if blacks think lowly of themselves
then there is no reason for them to think any more highly of other blacks. Thus, low levels of
self-efficacy, that is, “beliefs in one’s capabilities to organize and execute the courses of action
required to manage prospective situations,” result in low levels of faith in those persons that
are similarly situated. Accordingly, to see success is to believe in its promise. If black athletes
see more minorities in leadership positions it will help to dispel the myth that black agents are
incapable. Like Myrdal’s discussion of the vicious cycle in the context of social injustice in the
black community, a positive change in any one factor will cause the entire circle to move in a
positive direction. The Rooney Rule has the potential to shift the complete cycle in a positive
direction. Not only will it lead to a greater number of black coaches but it will also inspire more
black athletes to select black agents. This is true because the factors that affect whether an
athlete selects a black agent and the presence of black head coaches are interrelated. The
Rooney Rule has the capacity to replace the perception that black agents “can’t do” with a more
positive attitude that they “can do.” As black athletes see more blacks on the sideline, they will
be influenced to think of blacks as leaders as opposed to subordinates.

PART V: The Solution: The NFL Agent Draft

The NFL draft is widely hailed as a win/win for both the players and the owners in the NFL. The NFL draft has been a mainstay in the league since 1936.\(^1\) Since its inception, teams have selected players based on their performance from the previous season whereupon the team with the worst record gets the highest pick. As evidenced by its longevity, it is clear that the owners, as well as the players, highly regard the draft as a valuable resource. The NFL draft has become the key source for evaluating talent, maintaining a competitive league, and providing a fair opportunity for players and owners to adequately manage their financial resources. Without the NFL draft, the viability of the NFL would be completely undermined and its status as America's most profitable sport would change. Without a draft:

Free agency for all players, rookies included, would mean that N.F.L. teams would have to do a considerable amount of courting before they could get a player to walk down the aisle. Teams in places like Green Bay, Wis., would have to come up with a heck of a sales pitch and maybe loads of cash to get great players to come out into the cold. Conceivably, without a draft, N.F.L. teams would have to scour the country like college recruiters, selling the virtues of their team and trying to work out attractive financial packages to entice players to sign contracts. Just think, a system where a recruit could be offered a car, above the table, for signing. The thought is frightening to the N.F.L. 'It would be chaotic,' said Harold Henderson, N.F.L. executive vice president for labor relations and chairman of the N.F.L. Management Council. 'It would be counter to the competitive balance of the league. The teams with the most money and most desirable locations will be able to cherry pick the cream of the crop.'\(^2\)

While the NFL draft violates antitrust laws and restricts free trade it continues to exist because of its inclusion in the NFL's collective bargaining agreement.\(^3\) Although the NFL draft violates

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\(^3\) Hub Arkush, Future of NFL Draft is in Jeopardy, May 11, 2009, http://profootballweekly.com/2009/05/11/future-of-nfl-draft-is-in-jeopardy ("The NFL Draft has been included in every collective bargaining agreement since 1936. The current CBA will terminate in 2011 if the NFL is unable to negotiate a new deal by that time. If this occurs, the legality of holding a draft is questionable since the draft is only authorized because of the CBA. ‘It is assumed but not a given that, with no rules to play by, the owners would choose to lock the players out, and there would be no football in 2011 until one side or the other cries uncle. What happens if, during an interim period in the spring of 2011 with negotiations ongoing but no deal in place, one of the... \)
antitrust laws, such restrictions can be overridden by agreements between recognized unions and management. As such, players coming out of college can be forced to work for the team that drafts them. If the NFL Draft is so highly regarded by owners and players, the NFL should adopt a similar system to further enhance the diversity of sports agents in the NFL. Additionally, a draft like system for agents could provide several substantial benefits to the NFL franchises, the athletes, and the agents. Such a system will result in the elimination of much of the corruption that currently burdens collegiate football, place black agents on a more fair playing field in the athlete recruitment process and ensure that athletes get a better chance to evaluate the full scope of possible representation options.

(A) The NFL Draft

There are several events that occur before the NFL draft takes place. First, at the end of the college football season, the NFL Draft Advisory Board\textsuperscript{193} will render an expert opinion regarding the player’s draft prospects and their likely draft position (an educated guess about the round in which the player will be drafted). This information is extremely important to the athlete as it is one of the considerations that players use to determine whether it is in their best interest to enter the draft or return to college to continue their college eligibility. The next step in the process is the NFL Scouting Combine.

\textit{The NFL Scouting Combine is a three-day showcase, occurring every year at the end of February in Indianapolis at Indiana's Lucas Oil Stadium, where college football players perform physical and mental tests in front of NFL coaches, general managers and scouts. With increasing interest in the NFL Draft, the scouting combine has grown in scope and significance, allowing personnel directors to evaluate upcoming prospects in a league's wealthier owners - let's say a Daniel Snyder or a Jerry Jones - chooses to sign the 10 or 15 best players coming out of college to contracts, even if a deal is eventually struck and the draft reinstated? Anarchy is right around the corner…”}.

\textsuperscript{193}See Thomas Stinson, \textit{When in Doubt, Consult the Expert Panel}, ATLANTA J. CONSTITUTION, Dec. 21, 2008, at 7E (describing how and why the Board was created). See also Len Pasquarelli, \textit{Draft Advisory Board Usually on the Mark}, May 4, 2010, http://sports.espn.go.com/nfl/draft10/columns/story?columnist=pasquarelli_len&id=5161119 (describing the role of the NFL Draft Advisory Board as “only an opinion, and it is not to be considered binding in any way…”).
standardized setting. Its origins have evolved from the National, BLESTO and Quadra Scouting services in 1977, to the media frenzy it has become today. During the combine, players perform the following physical and mental tests:

- 40 yard dash
- Bench press
- Vertical jump
- Broad jump
- 20-yard shuttle
- Three-cone drill
- 60-yard shuttle
- Position-specific drills
- Interviews
- Physical measurements
- Injury evaluation
- Drug screen
- The Cybex test
- The Wonderlic Personnel Test

The NFL combine is an extremely important tool in determining a player’s potential draft position; however, not all draft eligible players are able to participate. The decision is left at the discretion of the NFL Draft Advisory Board and it will determine who is eligible to participate at the NFL combine based upon its own independent evaluation. If a player performs well during the NFL combine, he can substantially increase his draft position. However, a poor

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195 THN Draft Central, NFL Scouting Combine Drills, http://www.thehogs.net/Draft/combine/index.php (“The cybex test starts with a player strapped to a machine. The machine tests the player's joint movement and flexibility. While this test does not typically receive much attention, this test can be the difference between the first day and second day on draft weekend for a player with either a recent injury or a history of injuries.”). The wonderlic personnel test is designed to test a player’s cognitive ability.

196 NFLcombine.net, How are Players Selected for the NFL Combine?, http://www.nflcombine.net/faq/how-are-players-selected-for-the-nfl-combine (last visited May 26, 2010) (The NFL combine participants are determined annually by a Selection Committee. The Directors of both National and BLESTO scouting services, which combined represent twenty-six NFL teams, are joined by members of various NFL player personnel departments to form the committee. The participating NFL executives can rotate on a yearly basis, and remain anonymous. ALL eligible players are reviewed and voted on by the committee members. Each athlete receiving the necessary number of votes, by position, is then extended an invitation. While it is not a perfect science, the goal of the committee is to invite every player that will be drafted in the ensuing NFL Draft.)
performance during the NFL combine can have a detrimental impact on the player's draft prospects.197

The final step before the draft is pro day. Pro day is a day wherein each division one university showcases its draft eligible players in front of NFL personnel. Pro day performance can be just as important as a player's performance during the NFL combine since some players decline to workout during the NFL combine or wish to improve upon their combine statistics.198

(B) The Agent Draft Process

While this paper focuses on the application of an agent draft in the context of the NFL, this process could be equally successful in other sports. Moreover, the NFL is an excellent lens to consider this concept given that it is the only league to date that has adopted a policy on minority hiring. In addition, the focus of this paper is to merely introduce the idea of a diversity requirement in the agent selection process and how such a goal could be accomplished through an NFL draft type selection procedure. My hope is to show that the idea of such a process would work to improve what is currently in place by providing a greater level of balance.

An agent draft process could work much the same way as the aforementioned draft process for draft eligible college football players. Prior to the actual agent draft, an advisory board comprised of NFL personnel and representatives from the NFL players union, would select a diverse slate of agents that would be acceptable for agent representation. In making this initial determination, the agent advisory board would consider the following factors: the number of complaints against the agent, the general reputation of the agent, the likelihood of landing an

197 Stinson supra note 193, at 7E.
198 Jeff MacGregor, Thinking Outside the Box on the NFL Combine, Feb. 23, 2009, http://sports.espn.go.com/espn/print?id=3927393&type=story (Explaining that some players opt out of some events at the NFL combine to “hide something”)


actual client, the current client list, the agent’s experience, and player input. More importantly, the advisory board would strongly consider the importance of both gender and racial diversity.

After the advisory board selects the initial group of "draft eligible" agents, the NFL would hold an agent combine. Much like the NFL player's combine, where draft eligible players must undergo extensive mental and physical testing, the draft eligible agents would be required to undergo a series of tests. For example, the eligible agents might be required to undergo mental examinations, comprehensive criminal background checks, as well as subject specific testing including topics such as investing, financial accounting, the collective bargaining agreement and the law. In addition, the agents would also be required to compete against each other in agent specific events, such as negotiation strategy or contract drafting. This is extremely important as one of the greatest concerns that black agents have is that the current system prevents them from competing on a level playing field. With this process, the determination of who is the "best" possible agent will be more objective and fair.

The third, and probably the most important part of the process would include the player agent interview. During this phase, each player would be required to interview a specific number of agents before they could make their final determination. More importantly, much like the current Rooney Rule, the players would be required to interview at least one minority candidate. This process would ensure that minority agents would get a more fair opportunity to compete with white agents.

The fourth and final phase would culminate in an agent draft where each draft eligible player would select an agent from the pool of agents that they interviewed at the agent combine.
(C) **Benefits of an Agent Draft**

The aforementioned process could be used to substantially enhance the way that athletes select agents. More specifically, such a process could: (1) eliminate much of the corruption that currently burdens collegiate football by reducing the influence of runners and corrupt agents; and (2) place agents on a more fair playing field in the athlete recruitment process as well as ensure that athletes get a better chance to evaluate the full scope of possible representation options.

1. **An agent draft would substantially eliminate much of the corruption that currently burdens collegiate football by reducing the influence of runners and corrupt agents**

Under the current system, agents are able to disguise their relationships with athletes through illegal communications and illegal payments to the athlete and/or the athlete's family and friends. This issue has recently gained a significant amount of attention after Alabama's current head coach, Nick Saban, compared sports agents to “pimps” after his program came under fire resulting from allegations that one of his players, star defensive end Marcell Dareus, violated NCCA rules by attending a party sponsored by a sports agent.\(^\text{199}\) Marcell Dareus has since been suspended and there is some evidence to suggest that there may be a cadre of suspensions to follow as it has been speculated that 35 to 40 players may have attended the party.\(^\text{200}\) To curb these types of improper interactions, several states have enacted the Uniform Athlete Agents Act (“UAAA”).

Many of the provisions in the [UAAA] are similar or even identical to provisions found in some of the existing acts. The Uniform Act follows the majority of States which have required registration of athlete agents. Registration is required before initiating contact with a student-athlete to induce the signing of an agency contract. If the student-athlete initiates contact with an athlete agent, the athlete agent must apply for registration within seven days after commencing any effort

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\(^\text{199}\) Dennis Dodd, *While SEC defends itself, problems agents pose have no easy solution*, CBS Sports, Jul. 21, 2010


\(^\text{200}\) *Id.*
to induce the student-athlete to enter into an agency contract. The act includes a list of disclosures which must be made in the application for registration. It also includes a list of factors the administrator of the act must consider and a list of factors the administrator may consider in determining whether to issue a certificate of registration or suspend, revoke or refuse to renew a registration. The act specifies terms which must be included in an agency contract, requirements of notice to educational institutions after an agency contract has been entered into, the right of the student-athlete to cancel an agency contract within fourteen days after it is signed, and records which must be retained by the athlete agent. Enforcement of the act is provided for by sections which prohibit certain conduct and impose criminal and administrative penalties. The act also provides that an educational institution has civil remedies against either an athlete agent or a former student-athlete for damages caused by violation of the act.  

While the UAAA has the capacity to eliminate some corruption, it is not the best solution since it has yet to be adopted by every state. An agent draft type process would place an affirmative responsibility on the NFL to stop improper agent conduct. The UAAA also fails to ensure that an athlete will receive the best possible representation. Instead, the UAAA only provides that an athlete will get an agent that has complied with the requisite registration process. Thus, the UAAA creates a paradox that allows for an athlete to get an agent that has complied with the requisite registration process, yet, is a poor agent or an improper fit. Additionally, while the UAAA provides for a private right of action for an educational institution, it fails to adequately protect the athlete from exploitation by unscrupulous agents. This result has a detrimental effect primarily on black athletes because they are exploited to the greatest extent. Ironically,

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202 Id.

203 See Timothy Davis, Regulating the Athlete-Agent Industry: Intended and Unintended Consequences, 42 WILLAMETTE J. REV. 781, 811 (2006). ("The UAAA also provides colleges with a right to notice and a civil action for damages. Student-athletes and agents must notify institutions within 72 hours of the signing of an agency contract or before the student-athlete's next athletics event, whichever comes first. Educational institutions have a statutory right of action against agents and student-athletes for any losses and expenses resulting from a penalty imposed on an institution because of the conduct of an agent and student-athlete.")
while the UAAA provides substantial protection for the educational institution\textsuperscript{204}, it fails to provide the same rights to the athlete, the true victims of improper agent conduct (especially, when such agent conduct has the effect of cutting the athlete’s eligibility short). The UAAA provides a greater level of protection to the educational institution than the athlete. As Professor Davis accurately notes, “the primary focus of the UAAA is to protect the interests of educational institutions that might be adversely impacted if a student-athlete signs an agency agreement. To a lesser extent, the UAAA seeks to protect student-athletes. Uniformity is the UAAA’s other critical objective.”\textsuperscript{205}

The Sports Agent Responsibility and Trust Act (“SPARTA”) also attempts to regulate the conduct of agents; however, much like the UAAA, SPARTA was enacted primarily to protect colleges and universities, not athletes.\textsuperscript{206} “SPARTA’s key provisions are modeled after the provisions of the UAAA. SPARTA defines what constitutes illegal conduct by the athlete-agent. In this regard, the primary emphasis of SPARTA is deterring agents from recruiting student-athletes through the use of improper inducements and false information. It also attempts to discourage student-athletes from taking improper benefits from agents.”\textsuperscript{207} More specifically, SPARTA requires that sports agents, in connection with their representation of student athletes, exercise the following three duties: (1) the duty to be truthful, (2) the duty to disclose, and (3) the duty to refrain from "buying" an athlete.\textsuperscript{208}

Again, while both the UAAA and SPARTA regulate agent conduct, both statutes are primarily concerned with protecting colleges and universities. As some critics have advanced, these statutes fall short in several capacities. First, the statutory sanctions and penalties provided

\textsuperscript{204}Id. at 809.
\textsuperscript{205}Id.
\textsuperscript{206}Id. at 812.
\textsuperscript{207}Id.
by the UAAA and SPARTA are insufficient deterrents to improper/illegal agent activity because
the benefits that agents can reap from violating these statutes often outweigh the consequences,
especially when the agent is recruiting a superstar athlete. Second, neither statute provides the
student/athlete with a private right of action for any harm they suffer as a result of an agents’
improper/illegal conduct.  

Given the shortcomings of both the UAAA and SPARTA in protecting the athlete, more
protection is needed. The primary beneficiaries of these two pieces of legislation are colleges
and universities, the entities that need the least protection. In fact, these entities also actively
participate in the exploitation of the athlete.

Like it or not, college football serves as a minor league for the NFL. Sure the
athletes get their tuition covered, but that isn’t always a good trade-off for an
exceptional athlete like Bush. He generated more money for USC than the cost of
his tuition. Athletes like him deserve a piece of the pie.

Because of this exploitation, as well as the NCAA’s reluctance to hire black head coaches, there
is substantial evidence that the NCAA is not concerned with protecting division 1A college
football players, players that are overwhelmingly black. As such, it is untenable that both the
UAAA and SPARTA are overwhelming designed to protect these institutions. As such, colleges
and universities should not be the primary power holders under theses statutes because such a
system will only work to maintain the current agent power structure where white agents
overwhelmingly represent black athletes.

Because the overwhelming percentage of coaches and influential boosters are white, it is
more likely that a black athlete will be coaxed into the control of a white agent. Again, this is
extremely troubling considering that a white agent is unlikely to understand the cultural context.

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209 Davis, supra note 203, at 813.
210 Id. at 809.
211 Michael Tortorich, Many Colleges Athletes Earn More than their Keep, Weekly Citizen, Jul. 23, 2010,
http://www.weeklycitizen.com/sports/x522014480/Many-college-athletes-earn-more-than-their-keep
from which a black athlete is from to the same extent as a black agent.\textsuperscript{212} An agent draft process focused on diversity would address both of these issues, the extensive corruption in the agent recruiting process and the lack of black agents. As part of the agent draft process, agents would be required to comply with a registration process similar to that required under the UAAA and SPARTA. In addition, the agent combine process would also ensure that the athlete would get the best possible agent fit because the agent draft process would provide the athlete with an opportunity to assess the agent’s capacity by evaluating the agent’s combine performance. Additionally, as part of the Rooney Rule type agent interview process, the athlete would be presented with a diverse selection of agent prospects from which to choose. This would increase the likelihood that an athlete would end up with an agent that can more accurately represent his interests. More importantly, it will also provide the athlete with an agent that will better understand his cultural experiences. It would also increase the possibility that the athlete could end up with an agent that can better mentor the athlete.

(2) An agent draft would place all agents on a more fair playing field in the athlete recruitment process and ensure that more athletes get the best possible representation.

Overall, an agent draft would substantially increase the number of athletes who sign with black agents. Unlike the current system for landing clients, the primary focus under the agent draft process is on ability rather than predetermined and often racially unfair advantages. Through the agent draft process, black agents would be able to prove that they are just as capable as their white counterparts. More importantly, this process would allow more agents an opportunity to market themselves. While this process benefits black agents, it also benefits the athlete since they will be able to more accurately evaluate an agent’s capacity rather than hiring

\textsuperscript{212} Shropshire, supra note 21, at 133
an agent based upon hearsay about an agent’s perceived reputation or because one agent has a
deep pocket than another.

(D) Possible Difficulties of an Agent Draft Process

One of the legal hurdles of imposing the aforementioned agent draft selection process
that focuses on the importance of racial diversity is that such a process may violate antitrust laws
as an unreasonable restraint on trade. Given that such a process would likely upset the current
balance of agent power, it is likely to be challenged. However, the NFL could successfully
implement this process through the collective bargaining agreement. If so, any challenge by an
NFL agent is likely to fail as the NFLPA would have two independent and viable defenses, the
statutory labor exemption under Section 9(a) of the National Labor Relations Act (“NLRA”)\textsuperscript{213}
and the non statutory labor exemption\textsuperscript{214}.

(1) The Statutory Labor Exemption

Pursuant to Section 9(a) of the NLRA, the National Football Leagues’ Player Association
(“NFLPA”) is authorized as the exclusive representative of the NFL player members in
negotiations with the leagues over wages, hours and other conditions of employment.\textsuperscript{215} While
the NFLPA has the authority to negotiate on behalf of the players, it has expressly delegated this
responsibility to licensed third party agents.\textsuperscript{216} This delegation of power is critical for two
primary reasons.\textsuperscript{217}

First, there is the potential for a conflict of interest to arise between the interests
of the player members on a collective basis and the individual interests of each
player, since each player is competing against all the other player members both
on the field and in seeking the best contract possible. Second, the right of players

\textsuperscript{216} Richard T. Karcher, Fundamental Fairness in Union Regulation of Sports Agents, 40 CONN. L. REV. 355, 359
(2007).
\textsuperscript{217} Id.
to have their individual interests represented by an agent of their own choosing in their dealings with the clubs is critical to each player.\textsuperscript{218}

Delegation of this power also interjects a stronger sense of objectivity into the negotiation process and removes any possible veil of impropriety that might arise through a system if the NFLPA was the sole player representative. Through this power to delegate, the NFLPA is legally authorized to specifically exclude or forbid certain third parties from negotiating on behalf of its members.\textsuperscript{219} As a result of this delegation of power, the NFLPA has an increased interest in regulating the conduct of third party agents to ensure that its players are adequately represented. Absent agent regulation by the NFLPA through the current agent certification process, players would be subject to severe exploitation.\textsuperscript{220} As the court in \textit{Collins} highlighted, before there was a comprehensive regulatory scheme in the NBA to regulate agents:

\textbf{Players complained that the agents imposed high and non-uniform fees for negotiation services, insisted on the execution of open-ended powers of attorney giving the agents broad powers over players’ professional and financial decisions, failed to keep players apprised of the status of negotiations with NBA teams, failed to submit itemized bills for fees and services, and, in some cases, had conflicts of interest arising out of representing coaches and/or general managers of NBA teams as well as players. Many players believed they were bound by contract not to dismiss their agents regardless of dissatisfaction with their services and fees, because the agents had insisted on the execution of long-term agreements. Some agents offered money and other inducements to players, their families and coaches to obtain player clients.\textsuperscript{221}}

While the above referenced realities have been extrapolated from the context of the NBA, these stories are consistent with the same type of peril that NFL players would experience absent the current agent regulatory scheme. Because the NFLPA has an interest in protecting the integrity of its organization, the statutory labor exemption allows the NFLPA, through the NFL’s

\begin{footnotesize}
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\item \textsuperscript{218} Id.
\item \textsuperscript{219} Id. at 360.
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collective bargaining agreement, to regulate third party agents within the bounds of the law. More specifically, the NFL’s collective bargaining agreement provides an exception to the antitrust laws. Because of this exemption, the NFLPA is sufficiently cloaked with the authority to impose an agent selection system that places a greater emphasis on diversity. Again, while such a system is likely to be challenged as an unreasonable restraint on trade, such a challenge would fail. If a third party agent were to challenge such a system through the judicial process, a court would deal with the issue similar to the way the court dealt with a comparable issue in Collins v. National Basketball Players Association. In Collins, the plaintiff, an agent for several NBA players from 1974 to 1986, challenged the legality of the National Basketball Players Association’s (“NBPA”) regulation governing player agents and the operation of Article XXXI of the NBPA’s collective bargaining agreement, which forbade NBA teams from negotiating with agents who were not certified by the NBPA.

Collins voluntarily suspended his agent activities after he was sued by one of his former clients, Kareem Abdul-Jabbar, and a corporation that Abdul-Jabbar had established, Ain Jeem, Incorporated. Each corporation alleged that “Collins had breached a number of fiduciary duties when Collins mishandled Abdul Jabbar’s income tax returns, improvidently invested his money, mishandled his assets and transferred funds from his account to the accounts of other players represented by Collins.” Although the suits against Collins were ultimately settled, the NBPA decertified Collins for violation of other regulations. Thereafter, Collins submitted an application to be recertified as a player agent. Collins’ pervious questionable practices with

224 Id.
225 Id.
226 Id. (Collins failed to pay his dues and attend a required course.)
227 Id.
his clients, namely Kareem Abdul-Jabbar, caused the NBPA to launch an investigation before deciding on his certification status. The investigation committee ultimately denied Collins certification as an agent after it found that “Collins was unfit to serve in a fiduciary capacity on behalf of NBA players and that he had made false or misleading statements” during the committee investigation. As a result, Collins brought suit against the NBPA challenging the committee’s decision on the basis that its actions were an unreasonable restraint on trade and were not protected by either the statutory or non statutory labor exemptions.

In regards to the statutory labor exemption, Collins argued that it did not apply because the NBPA’s regulations on agent certification and preclusion of non agents from representing players in individual salary negotiations constituted a boycott. The Court disagreed holding that the NBPA was immune from antitrust liability based on the statutory labor exemption. Pursuant to this exemption, the NBPA was protected in both the promulgation of regulations to govern agent certification and its decision to preclude non-certified agents from representing players in individual salary negotiations. As to the boycott argument, the court held that such action is allowed and does not violate antitrust law because the NBPA “as the exclusive representative for all of the NBA players, is legally entitled to forbid any other person or organization from negotiating for its members. Its right to exclude all others is central to the federal labor policy embodied in the NLRA” A group boycott is a concerted refusal by traders

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228 See id at 1473.
229 Id.
231 Id. at 1474.
232 Collins, 850 F. Supp. at 1472 (The court also held that the NBPA’s actions were protected from “antitrust scrutiny in the Norris-LaGuardia Act which restricts the power of the federal courts to issue any injunction in a case growing out of a labor dispute, and forbids the issuance of any injunction contrary to the public policy of the United States”).
233 Id. at 1475.
The court rejected Collins’ boycott argument, reasoning that “Collins does not trade or compete with the NBPA, the NBA or the NBA member teams. His trade is dependent upon the teams of the NBA as well as its players, but he has no protected interest under the law since he is neither a competitor nor an employer.” Accordingly, it was within the authority of the NBPA to regulate the conduct of any agent seeking to represent its players as long as those regulations did not affect a competitor (another basketball league) or another employer (another NBA team). As the bargaining representative for all of the professional basketball players employed by the twenty-seven NBA member teams, the NBPA has the exclusive authority to negotiate individualized salaries for each player. The NBPA established the regulations, a comprehensive system of agent certification and regulation, to insure that players would receive agent services that meet minimum standards of quality at uniform rates. This was done in response to the players’ complaints of agent abuses.

According to the court in Collins, the Regulations serve a two-fold purpose. First, they protected the players by providing them with a uniform minimum standard for agent based services. Second, these regulations bound agents, desiring NBA clients, to comply with a comprehensive set of governing rules and established parameters for fee restrictions and a comprehensive code of conduct.

(2) The Non Statutory Labor Exemption

The Collins court also addressed the non statutory labor exemption and found that even if the statutory labor exemption was not applicable, the conduct fell within the non

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234 Id. cf Connell Const. Co., Inc. v. Plumbers and Steamfitters Local Union No. 100, 421 U.S. 616 (1975) (Holding that union violated antitrust laws by imposing a boycott and excluding non-union subcontractors from a portion of the market where union forced a general contractor to agree to subcontract all of its work only to firms that employed union members).

235 Id.

236 In 1991, there were 27 NBA teams, but today the league has expanded to 30 teams.

statutory labor exemption. The non statutory labor exemption immunizes labor arrangements that are the ordinary implication of activities contemplated by the federal labor laws. Generally, workers organize together (usually in unions) to meet, converse, and negotiate upon the work conditions with their employers by collective bargaining, which usually generates a written contract setting forth the wages, hours, and other conditions to be observed for a stipulated period. “[I]n order to accommodate the collective bargaining process, certain concerted activity among and between laborers and employers must be held to be beyond the reach of antitrust laws.” Thus, the non-statutory exemption to antitrust review has been inferred from “[f]ederal labor statutes, which set forth a national labor policy favoring free and private collective bargaining; which require good-faith bargaining over wages, hours, and working conditions; and which delegate related rulemaking and interpretive authority to the National Labor Relations Board.” The purpose of the exemption is to “prevent the courts from usurping the National Labor Relations Board's function of ‘determin[ing], in the area of industrial conflict, what is or is not a ‘reasonable’ practice,’ and ‘to allow meaningful collective bargaining to take place’ by protecting ‘some restraints on competition imposed through the bargaining process’ from antitrust scrutiny.”

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238 Collins, 850 F. Supp. at 1480.
239 Id. at 1479.
Based on the purpose of the non statutory labor exemption, the Collins court held that the NBA’s regulations were immunized from Sherman Act scrutiny. More specifically, the court held that:

The regulations were unilaterally developed in response to player complaints and to further NBPA labor policies. The NBPA-NBA Agreement, including Article XXXI, was agreed to in arms-length collective bargaining. The provision was not sought ‘at the behest of or in combination with’ any employer or other non labor group as forbidden by Jewel Tea. There is no economic benefit to the NBPA or the NBA member teams as a result of this provision and there is no effect on the employer’s product or service market as a result of the provision.

The Second Circuit’s decision in the Maurice Clarett case also provides an excellent example of how courts apply the non-statutory labor exemption. In Clarett, Maurice Clarett sued the National Football League (“NFL”), challenging the NFL’s three year rule, requiring that players seeking to enter the NFL draft wait three years after graduation from high school before they are eligible to declare for the NFL draft, as an unreasonable restraint on trade. The NFL argued that the three year rule was exempt from antitrust liability pursuant to the non statutory labor exemption. Applying the rule from Mackey, the District Court entered summary
judgment in favor of Clarett holding that the NFL could not prohibit Clarett from participating in the NFL draft. First, the district court reasoned that Clarett as “prospective” player was not a party to the collective bargaining agreement. The court made a significant distinction between “current” and “prospective” players. According to the district court, current players were bound by the collective bargaining agreement because they stepped “into the shoes of the players who did engage in collective bargaining.” Conversely, Clarett, as a prospective player, based on the three year rule, was denied the opportunity to become a current player. As a result, the court opined that “those who are categorically denied employment, even temporarily, cannot be bound by the terms of employment they cannot obtain.” Second, the district court reasoned that the three year rule did not focus on a mandatory subject of collective bargaining, such as wages, hours, or conditions of employment. Instead, the district court held that the Rule was wholly unrelated to any of the aforementioned mandatory subjects of collective bargaining. More accurately, the Rule only incidentally affected wages “in the sense that a player subject to the Rule will earn none.” Based on this conclusion, the court held that the second prong of the test was not met. Finally, because the Rule was implemented before both the NFLPA and the NFL’s collective bargaining agreement came into existence, it was not possible that the Rule could be the product of a bona fide arm’s length bargaining process.

In response to the district court’s decision, the NFL appealed and the Second Circuit reversed and remanded on several grounds. First, it held that the Mackey test was inapplicable to the facts of Clarett’s case because the Mackey test only applies where an employer, organized around the particular market, is complaining about exclusion from participation, not where a

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249 Id. at 396.
250 Id.

prospective employee is complaining. The Mackey analysis is best suited for cases where the alleged anticompetitive effect of the challenged restraint is on a labor market organized around a collective bargaining relationship. Furthermore, the Court has previously recognized that the Mackey test and those cases that apply this test provide “[l]imited assistance in determining whether an athlete can challenge restraints on the market for professional sports players imposed through a collective bargaining process, because [in Jewel Tea] all [claims] ‘involved injuries to employers who asserted that they were being excluded from competition in the product market,’” not employees. Maurice Clarett challenged the NFL’s eligibility rules only on the ground that they were an unreasonable restraint on the market for players’ services. The court may have reached a different holding if Clarett had asserted that the NFL’s draft eligibility rules disadvantaged the NFL’s competitors in the market for professional football players or if such a rule protected the NFL’s dominance in the market for player services.

Instead of applying the Mackey test, the court applied the reasoning from Caldwell, and Wood because these cases were more directly applicable to

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251 Amalgamated Meat Cutters & Butcher Workmen v. Jewel Tea Co., 381 U.S. 676 (1965). (In an action by the operator of a chain of retail grocery stores against defendant labor unions and association of food retailers representing independent food stores alleging a violation of the Sherman Anti-Trust Act, the Supreme Court held that the multiemployer agreement with unions not to sell meat between 6 p.m. and 9 a.m., even in self-service markets, was within labor exemption of the Sherman Anti-Trust Act.).

252 Clarett, 369 F.3d at 134 (citing Wood v. Nat’l Basketball Ass’n, 809 F.2d 954, 963 (2d Cir. 1987)).

253 Id.


255 Caldwell v. Am. Basketball Ass’n, 66 F.3d 523 (holding that the nonstatutory labor exemption barred the basketball player’s antitrust claim, in that allowing the player’s claim to proceed under the Sherman Act would subvert fundamental principles of federal labor policy, which required the NLRB to handle disputes about the cause of union activity discharges).

256 Nat’l Basketball Ass’n v. Williams, 45 F.3d 684 (In an action by NBA team owners against players for the enforcement of expired collective bargaining agreement provisions the court held that the nonstatutory labor exemption precluded the players’ antitrust challenge to the continued use of the expired agreement provisions after an impasse was reached in negotiations).

257 Wood v. Nat’l. Basketball Ass’n, 809 F.2d 954 (In an antitrust action by college basketball players against the NBA, the court held the “salary cap” and college draft provisions amounted to an agreement among horizontal competitors and was not a violation of the Sherman Act, agreements between the NBA and NBPA could not be challenged on antitrust grounds and if the collective agreement were to be challenged the proper action would be one for breach of duty of representation).
Clarett’s case since all of them “involved players’ claims that the concerted action of a professional sports league imposed a restraint upon the labor market for players’ services.” In each of these cases, the court held that the non statutory labor exemption defeated the players’ claim. In applying the reasoning from these cases, the court held that Clarett was not entitled to participate in the draft for the following reasons:

First, the court held that the district court failed to classify the Eligibility Rules as a mandatory subject of bargaining, reasoning that precedent supported a finding that terms of employment are mandatory subjects and the direct relationship that employee competition had on wages and working conditions for all employees. Next, the court held that the Eligibility Rules were mandatory subjects of bargaining because they influenced terms of initial employment, wages and working conditions and were part of the CBA. Lastly, the court addressed the relationship between the CBA and the Eligibility Rules and concluded that Eligibility Rules were a mandatory bargaining subject and therefore exempt from antitrust law; the court explained that the NFLPA acquiescence to the 2003 amendment served as an acceptance in accordance with the collective bargaining process.

As both Collins and Clarett highlight, courts are highly deferential to a professional league’s right to regulate players and third parties through collective bargaining agreements. In both of these cases, the factual circumstances presented to the court by the party seeking to invalidate the league’s rules or regulations, presented a far more compelling case for not applying the statutory and the non statutory labor exemptions than any case an agent could make if the NFLPA were to adopt an NFL agent draft process that focused on the importance of diversity. Yet, both courts upheld the relevant regulations pursuant to the NBA’s and the NFL’s collective bargaining agreements respectively.

258 Clarett, 369 F.3d at 135.
259 Id.
The NBA’s regulations in Collins proved to be a complete bar to Collins’ ability to represent players in the NBA. Conversely, the proposed NFL agent draft process outlined above does not deprive any agent of the capacity to represent players in the NFL. Instead, such process would only place an emphasis on the importance of diversity and provide prospective players with better and more competent representation. First, by implementing an NFL Agent Draft, the NFL would be working to achieve a legitimate self-interest, diversity. In its efforts to increase diversity, the NFL would be taking steps to achieve this goal by creating an environment that would allow more minority agents equal access to prospective NFL players. Second, an NFL agent draft would not impose any restraints on any agents outside of the NFL. The market for NFL agents is only limited to those that are certified by the NFLPA and does not extend beyond those parameters. As such, if the regulations in Collins weren’t sufficient to remove the NFL’s right to invoke the statutory labor exemption then is highly unlikely that it could work to preclude an agent selection process that focuses on diversity.

Even if the NFLPA was unable to invoke the statutory exemption in promoting a diversity based agent selection process, such action could be accomplished through the non statutory labor exemption.

When the agreement is reached through bona fide, arms-length bargaining between the union and the employers, and the terms of the agreement are not the product of an initiative by the employer group but were sought by the union in an effort to serve the legitimate interests of its members, it is free from antitrust scrutiny.261

Moreover, if the facts of Clarett were insufficient to prohibit the NFL from invoking the non statutory labor exemption, then again it is highly unlikely that any agent could stop the NFL from promulgating rules to increase diversity among agents that represent players in the NFL.

The facts of *Clarett* present a far more compelling argument for invoking the non statutory labor exemption than any argument an agent wishing to challenge a diversity based agent selection could allege for not applying either of the exemptions. First, in *Clarett*, much like *Collins*, Clarett had no other viable options. As the district court noted:

Although there are other professional football leagues in North America-including the Arena Football League, the Arena Football League 2, the National Indoor Football League, and the Canadian Football League the NFL dominates. It consistently outperforms all other professional *sports* leagues, not to mention the other professional football leagues, in both revenues and television ratings. Not surprisingly, the League's fiscal success also inures to the benefit of its players. The average NFL player earned $1,258,800 in 2003; the average starting NFL running back (which Clarett aspires to be) earned $1,578,275; the average first-round draft choice (which Clarett also aspires to be) earned $1,367,120; the *minimum* salary that a rookie may be paid is $225,000. In contrast, the 2000 salary cap in the Canadian Football League-the total amount of money that a team was permitted to pay to *all* 50-odd of its players combined-was approximately $1,700,000. Similarly, the 2003 team salary*384 cap in the Arena Football League was $1,643,000. In other words, the average starting running back in the NFL makes only slightly less than the average *teams* do in the CFL and AFL. In short, the NFL represents an unparalleled opportunity for an aspiring football player in terms of salary, publicity, endorsement opportunities, and level of competition.262

In light of this reality, again, the court ruled in favor of the NFL. If the court was willing to rule in favor of the NFL given Clarett’s lack of viable alternatives, then it is highly unlikely that a court would rule in favor of an agent who might potentially challenge an NFLPA rule seeking to increase the level of diversity among NFL agents. Agents, in general, have other viable options. Agents that might get passed over in a diversity based process could choose to represent players in other leagues. In addition, any agent that was somehow eliminated from consideration from representing a player in a player’s negotiations with the NFL could still represent that player in any negotiations outside of his dealings with the NFL. Second, the provision in Clarett was

implemented before the CBA came into effect, yet the court still determined that the provision was a mandatory bargaining subject. Again, any agreement to include diversity as part of the agent selection process would be implemented after the CBA, thus weakening any argument that a disputing agent would assert. In addition, if the NFL were to implement such a provision, it would be implemented directly as a result of arm’s length negotiation, not merely as a result of implicit acquiesce. 263

Should the NFL want to effectuate a policy promoting diversity in the agent selection process, it would be well within its rights to promulgate such a rule pursuant to both the statutory and non statutory labor exemptions. If diversity is valued in selecting coaches and administrative personnel, then it should also be valued in selecting agents, as it is the agent that has the greatest ability to influence the athlete. Thus, for the very same reasons that the NFL has determined that diversity in other context is a compelling league interest, it should also value it at the agent level.

Part VI: Other Suggestions

A. To increase the role of the black agent, there must be a stronger alliance between the Black Sports Agents Associations (“BSAA”), the Fritz Pollard Association (“FPA”) and the Black Coaches and Administrators (“BCA”).

It is critical that the BSAA, the FPA and the BCA facilitate a greater level of collaboration as they all share a common goal—increasing the number of blacks in leadership positions in sports. One area where such collaboration is of central importance is in statistically

263Sia, supra note 260, at 165 (“The NFLPA’s acquiescence to the 2003 amendments to the CBA served as an acceptance in accordance with the collective bargaining process”).

264David J. Leonard, Golden Shackles, WASHINGTON POST, Aug 13, 2006, at BW08, available at http://www.washingtonpost.com/wp-dyn/content/article/2006/08/10/AR2006081001366.html. (“To recover from their stasis and help their fellow African-Americans ‘convert all our accumulated wealth and presence into power,’ black athletes must join with black agents, sportswriters and sports executives to extend their influence ‘beyond the courts, fields, and diamonds.’ Greater power, through various types of ownership and collective action, would elevate blacks as a whole, enabling black athletes to ‘play a pivotal role’ in shaping society while reestablishing institutions and community power lost during the era of integration…. .” (quoting William C. Rhoden, FORTY MILLION DOLLAR SLAVE, The Rise, Fall, and Redemption of the Black Athlete (2006)).
analyzing the impact and opportunities of black agents in the NFL. According to Mark Levin, the Director of Salary Cap & Agent Administration for the National Football League Player Association (“NFLPA”), the NFLPA has never tracked the racial composition of its agents.265 Surprisingly, and to the best of my knowledge, as of the date of this article, no one has ever conducted any thorough statistical analysis on any of the following issues: the number of black agents in the NFL, how many of those black agents have clients, what types of clients the black agents represent, whether the attrition rate for black agents is greater than that of white agents, or whether the NFLPA’s requirements, regulations and cost have a disparate impact on black agents.266 In arriving at any sort of empirical understanding of these issues, the most often quoted data is from a dated approximation by the BSAA wherein they estimate that there are roughly 400 black sports agents among 5,000 sports agents and that only fifty or so have recognizable clients. As such, empirical research in this area is ripe for further inquiry. Again, it was a similar type of statistical inquiry, analyzing the disparities among minority coaches in the NFL that led to the implementation of the Rooney Rule.

B. Black head coaches have to avoid following the path set by Clarence “Uncle” Thomas

It is clear that the Rooney Rule has been a resounding success in increasing the number of minority head coaches. As Cyrus Mehri explains in his article The Critical Role of the Fritz Pollard Alliance,

265 Telephone Interview by Tom Kreger with Mark Levin, Director of Salary Cap & Agent Administration, Nat’l Football League Player Ass’n, in NW Washington, DC. (Summer 2008). (responding to an email from my research assistant, Tom Kreger, Mr. Levin, indicated that the NFLPA has never tracked statistics on the demographic of an agent’s race).
266 NFL Players Ass’n, Agent Regulations (2009), http://images.nflplayers.com/mediaResources/files/PDFs/SCAA/NFLPA_Regulations_Contract_Advisors.pdf. (Some of these requirements, regulations and cost include: payment of a $1,650 non-refundable application fee; completion of an undergraduate and post-graduate degree (Master’s or Law) from an accredited college/university; travel to Washington, D.C. for a two day seminar followed by a written exam (which supposedly only has about a 60% passing rate); continue to attend an NFLPA seminar every year; negotiate at least one player contract within every three-year period that the agent is certified; and pay yearly insurance premium.)
The Rooney Rule has seen great success including the hiring of Marvin Lewis in Cincinnati, Lovie Smith in Chicago, Mike Tomlin in Pittsburgh and Raheem Morris in Tampa Bay. That said, these successes have not come without some tough calls, not just in Cincinnati, but with Lovie Smith being selected as coach for the Chicago Bears. With Lovie Smith, Chicago may not have gone into the interview process it did if not for the existence of the Rooney Rule. Also, but for the Rooney Rule, Chicago may not have been able to tip the balance in the favor of the minority candidate being hired simply because of all the historical racial issues we have faced as a country. To break down those historical racial barriers, individuals had to get into the room, and appropriately salute and celebrate the diversity which is at the base of the Rule.\(^{267}\)

Given the level of success that black coaches have experienced as a result of the Rooney Rule, an affirmative action type initiative, they have an affirmative responsibility to employ diversity type policies in making their own decisions. If black coaches fail to meet this obligation, the black community should scrutinize them to the same extent that they scrutinize Justice Thomas for making what are largely considered to be anti affirmative action decisions.

In modern black communities, the name “Uncle Tom” is synonymous with a black that is too eager to please white people. Within these same black communities, United States Supreme Court Justice, Clarence Thomas, is largely viewed as the quintessential “Uncle Tom.” This perception is largely predicated upon the rampant belief that Justice Thomas has been one of the greatest beneficiaries of affirmative action, yet he has been one of the strongest voices on the Court against it.\(^{268}\) Many critics allege that Justice Thomas benefited from affirmative action in at least two capacities, his United States Supreme Court appointment by George H. W. Bush and through his admission to Holy Cross for college and to Yale for law school. In regards to Justice Thomas’s Supreme Court appointment, Bush contemplated appointing Justice Thomas when Justice William Brennen stepped down in 1990; however, he decided against it because he felt

\(^{267}\) Mehri, \textit{supra} note 70.

\(^{268}\) Weston Kosova, \textit{Fortunate Son}, NEWSWEEK, Oct. 6, 2007, http://www.google.com/#hl=en&source=hp&q=fortunate+son+weston+kosova&aq=f&aqi=&aql=&oq=&gs_rfai=COYYy98KTP-mMIRGZQ5gvpjoBgAAAKoEBU_Q0E0N&fp=ce1b3171e41a9d3df.
that Thomas lacked the necessary experience. The following year, Justice Marshall retired and Bush again considered Justice Thomas. Initially, Bush was concerned about replacing Justice Marshall with Justice Thomas because he did not want the public to perceive the appointment as a token appointment. Despite these concerns, Bush ultimately nominated Justice Thomas to replace Justice Marshall on July 1, 1991. Surprisingly, Justice Thomas lacked the requisite experience to assume a position on the Court in 1990 when Justice Brennen stepped down, but amazingly possessed the necessary experience, only one year later, when Justice Marshall, the only black Justice to serve on the Court at that time stepped down. In light of Bush’s concerns, many people still view Justice Thomas’s appointment largely as an affirmative action appointment. As for Justice Thomas’s admission to Holy Cross and Yale, there is some suggestion that his matriculation into both of these institutions occurred only after both schools adopted affirmative action programs to increase minority enrollment.\textsuperscript{269} As such, Justice Thomas often receives a substantial amount of criticism for his anti affirmative action opinions and is largely viewed in the black community as an Uncle Tom.\textsuperscript{270} The black community must place this same level of criticism on black coaches to ensure that they remain accountable to the mission of diversity and for the upward mobility of the black community.

While the Rooney Rule has the capacity to provide a substantial benefit to both black coaches and black agents, black coaches have an important responsibility, they must avoid following the path of Clarence “Uncle” Thomas. Clearly, the Rooney Rule has lead to an increase in the number of black head coaches, but to reap the full benefit of the Rooney Rule, black coaches, must apply the spirit of the Rooney Rule in making their own personal business decisions. It is untenable to have black coaches hired primarily as a result of an affirmative

\textsuperscript{270} See id.
action policy, yet fail to apply the same type of policy in their own decisions. If black coaches fail to apply the same type of affirmative action policy in their own personal decisions, the Rooney Rule may prove to be more harmful than beneficial. If black head coaches elect to have their business affairs managed and controlled by white agents, then such reality will only serve to further strengthen the view that the “white man’s ice is colder.” In fact, this situation may be more stigmatizing as it sends a message that black leaders, those charged with leading the race, are pre-conditioned to accept whiteness as superior to blackness.

Currently, there are six black head coaches in the NFL, Mike Tomlin\textsuperscript{271}, Marvin Lewis\textsuperscript{272}, Lovie Smith\textsuperscript{273}, Raheem Morris\textsuperscript{274}, Jim Caldwell\textsuperscript{275} and Mike Singletary\textsuperscript{276}. Surprisingly, five of these six coaches have white agents. This disturbing truth begs the question of whether these coaches suffer from the same perils and systematic influences that black athletes in the NFL experience. More importantly, these coaches should have a greater responsibility to seek out other blacks for professional services considering that many of these same coaches would not have received an opportunity to coach in the NFL but for the Rooney


\textsuperscript{272} Sports Business Journal, \textit{Octagon signs a three-pack of high-profile NFL Coaches}, http://www.sportsbusinessjournal.com/article/57763 (last visited Aug. 11, 2010) (Marvin Lewis is the current head coach of the Cincinnati Bengals and is represented by a team of agents at Octagon Sports headed by Phil de Picciotto, the Octagon president of athletes and personalities).

\textsuperscript{273} USA Today.com, \textit{Lovie Smith still in Limbo as Bears start offseason planning}, http://www.usatoday.com/sports/football/nfl/bears/2010-01-04-lovie-smith_N.htm (last visited Aug. 10, 2010). (Lovie Smith is the current head coach of the Chicago Bears and is represented by Frank Bauer).


\textsuperscript{275} Ropes & Gray, LLP, \textit{Professionals}, http://www.ropesgray.com/denniscoleman/ (last visited Aug. 16, 2010). (Jim Caldwell is the current head coach of the Indianapolis Colts and based on my research to date, is the only black head coach in the NFL represented by a black agent, Dennis Colemen, a partner in Ropes & Gray LLP’s corporate department).

\textsuperscript{276} Professional Sports Representation, \textit{Our Clientele}, http://psr-inc.net/clientele.html (last visited Aug. 10, 2010). (Mike Singletary is the current head coach of the San Francisco 49ers and is currently represented by Bob Lamonte).
Rule. These coaches should be at the forefront of the movement to find and hire other competent black professionals. If black coaches fail to actively seek out black agents for representation in their own professional relationships, then they are not living up to their own social responsibility to promote black opportunity and instead are headed down the same path as Clarence “Uncle” Thomas.

CONCLUSION

Almost sixty years ago, Doctors Kenneth Clark and Mamie Clark conducted the famous “Clark doll experiment,” wherein they asked both white and black children a series of questions based on the childrens’ perceptions about two dolls. The dolls were exactly the same, except that one doll was white while the other was black. The Clark doll experiment was a pivotal piece of evidence in overturning Plessy in the Court’s decision in Brown. In the test that was conducted and used in Brown, the Clarks asked sixteen (16) black children in Clarendon County, South Carolina a series of questions, one of which was “which one is the nice doll?” In response, 63% of the black children indicated that the white doll was the nice one. With the children’s responses, the Clarks were able to show how segregation had a detrimental affect on black children. Armed with this evidence, Thurgood Marshall was able to effectively

277Mamie Phipps Clark, The Development of Consciousness of Self in Negro Pre-School Children (1939) (unpublished Master’s thesis, Howard University) (on file with author) ((1) “Show me the doll that you like best or that you’d like to play with;” (2) “Show me the doll that is the ‘nice’ doll;” (3) “Show me the doll that looks ‘bad’;” (4) “Give me the doll that looks like a white child;” (5) “Give me the doll that looks like a coloured child;” (6) “Give me the doll that looks like a Negro child;” (7) “Give me the doll that looks like you.”).
278Id.
279Plessy v. Ferguson, 163 U.S. 537 (1896).
280Clark, supra note 276.
281Id.
282KiriDavis.com, Appearance on Oprah Show, http://www.kiridavis.com/index.php?option=com_content&view=article&id=10&Itemid=8888904 (last visited June 7, 2010) (“In 2005, 18-year-old filmmaker Kiri Davis recreated the Clarks’ experiment with 21 young black children at a daycare center in New York. In her seven-minute documentary, A Girl Like Me, Kiri presented the children with two dolls—a black one and a white one. Then, like in the original experiment, Kiri asked which they would rather play with and which they thought was ‘nice’ and which was ‘bad.”’ In response 71% of the children responded that the white doll was the nice one).
Sixty years later, not much has changed as blacks continue to “pick the white one.” This time it is not the doll. Instead, black athletes continue to consistently select white agents. Much like the children in the Clarks’ experiment, black athletes somehow believe that the white man’s ice is colder. Through the Rooney Rule, black players have a viable opportunity to dispel this myth as they now have the capacity to see competent blacks in key strategic decision making positions. As black athletes experience this reality, the internalized racism from which they currently suffer will finally start to dissipate. Because black players can now readily observe a black president and an increased number of black head coaches, there is no excuse for them not to think more critically about hiring black agents. Accordingly, because of the Rooney Rule, all black players now have a realistic ability to proclaim “My president is black and I be got dammed if my a gent ain’t too!”

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284 Rickford, supra note 145.